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DE LA

PROVINCE DE QUÉBEC

RAPPORTS

JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC

COMPRENANT LA

REVISION COMPLÈTE ET ANNOTÉE DE TOUTES LES CAUSES RAPPORTÉES DANS LES DIFFÉRENTES REVUES DE DROIT DE CETTE PROVINCE JUSQU'AU 1er JANVIER 1892

AINSI QUE

DES CAUSES JUGÉES PAR LA COUR SUPRÊME ET LE CONSEIL PRIVÉ SUR APPEL DE NOS TRIBUNAUX

PAR L'HONORABLE M. MATHIEU

Juge de la Cour Supérieure de Montréal, professeur à la Faculté de Droit de l'Université Laval à Montréal

TOME IX

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ABRÉVIATIONS.

P. D. T. M.:—Précis des Décisions des Tribunaux du district de Montréal, 1854, par T. K. RAMSAY et L. S. MORIN, avocats.

D. T. B. C.:—Décisions des Tribunaux du Bas-Canada, en 17 volumes, commencées en 1851, par MM. LELIÈVRE, ANGERS, BEAUDRY et FLEET, avocats.

J.:—Lower Canada Jurist.

R. J. R. Q.: Rapports Judiciaires Revisés de la province de Québec, par le juge MATHIEU.

C. C.:—Code Civil du Bas-Canada.

C. M.:—Code Municipal du Bas-Canada.

C. P. C.:—Code de Procédure Civile du Bas-Canada.

S. R. Q.:—Statuts Refondus de la Province de Québec.

S. R. C.:—Statuts Revisés du Canada.

C. B. R.:—Cour du Banc de la Reine ou *Cour du Banc du Roi.*

C. S.:—Cour Supérieure du Bas-Canada.

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RAPPORTS JUDICIAIRES REVISÉS

DE LA

PROVINCE DE QUÉBEC.

QUASI-DELIT.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 1st September, 1860.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

HYNES, Appellant, *and* MCFARLANE, Respondent.

Jugé: Qu'une partie qui met le feu sur sa terre dans une saison qui n'est pas convenable, est par ce seul fait responsable de la perte d'un moulin à battre qui avait été mis sur sa terre pour y battre son grain. (1)

The action in the court below (the Superior Court in the district of Ottawa), was brought to recover £65, the value of a thrashing machine belonging to Appellants, which was destroyed by fire on the land and premises of Respondent. The declaration contained two counts: the first setting up that the machine, the property of Plaintiff, was, on the 28th August, 1856," upon the land, and in the possession and custody of " Defendant, where the same had been placed by Plaintiff, at " the request and for the convenience and benefit of Defen- " dant, who undertook and bound himself to deliver the same " to Plaintiff when thereto requested; that Defendant did " carelessly, imprudently and neglectfully set fire to certain " grass and vegetable, and wood growth, then being and grow- " ing near and contiguous to said thrashing machine, and " having so set fire, did, carelessly, imprudently and neglect- " fully, allow said fire to progress and consume whatever it " might, unwatched and unattended to, in consequence where- " of, the fire so set and allowed to consume by Defendant, " caught and consumed the thrashing machine, thereby causing " damage to Plaintiff of £65 currency." The plea was a *défense au fond en fait.* From the evidence of record it

(1) V. art. 1053 C. C.

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appealed that Plaintiff had a thrashing machine with which he used to go about the country and thrash grain for hire; that, on the occasion in question, the machine was placed in a field near Defendant's stacks of wheat, where it remained for some days unemployed, Appellant's sons, who assisted in working the machine, having gone home to assist Plaintiff, their father, in reaping; that, on the day in question, certain fallow ground on which were brush heaps, was set fire to for the purpose of clearing the land, the wind then blowing from the stacks, but that, afterwards, the wind suddenly changed and blew strong towards the stacks, which were set on fire, as well as the thrashing machine. The fire, it appeared, had communicated to the stacks by the stubble. It was in evidence that Respondent used every means in his power to prevent the destruction of the machine. The judgment of the court below dismissed Plaintiff's action: "Considering that Plaintiff has failed to establish any gross negligence against Defendant, in his care of the thrashing machine, and that, in consequence thereof, he, Defendant, is not liable for the loss of the thrashing machine." On appeal, this judgment was reversed, and the following one rendered: "The court, seeing that the destruction of the thrashing mill was occasioned by the imprudence of Respondent, in setting fire upon his land, at an improper and unfitting time, and that, therefore, he is rightly accountable to Appellant for the damages done to him by reason of the same; seeing, therefore, that, in the judgment of the court below there is error: It is considered and adjudged that the same be and the same hereby is reversed, and it is further considered and adjudged that Respondent do pay to Appellant, as and for damages by him sustained, the sum of £60, with interest from this day. DUVAL, Justice, *dissentiente*. (10 *D. T. B. C.*, p. 502.)

McCORD, for Appellant.

AYLEN, for Respondent.

CAUTIONNEMENT.—APPEL.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 7 décembre 1860.

Before Sir L. H. LAFONTAINE, Bt., C.-J., AYLWIN, DUVAL, MEREDITH and C. MONDELET, Justices.

BURROUGHS, Appellant *and* SIMPSON, Respondent.

Jugé: Qu'un cautionnement en appel consenti avant l'émanation du writ d'appel, est nul et de nul effet. (1)

(1) V. art. 1121 et 1122 C. P. C.

The bond of security in appeal was executed on the 13th of October. The writ of appeal issued on the 17th of October. It was served on the Respondent on the 30th of October, and returned on the 31st of the same month. ABBOTT, for Respondent, moved to reject the appeal; on the ground chiefly that the security bond was valueless as having been executed before the issue of the writ of appeal to which it applied. He cited 25 Geo. III, cap. 2 § 29 to show that a bond taken before the issue of the writ was only valid in an exceptional case, and required express enactment to make it so.

PER CURIAM: The bond is utterly worthless, for the reason stated by Respondent. The appeal is dismissed.

JUDGMENT: "Seing that the bond or security given in this cause was received before the prothonotary of the Superior Court at Ste. Scholastique, before the issuing of the writ of appeal in this cause, and is therefore null." Writ quashed. (11 *D. T. B. C.*, p. 72, et 5 *J.*, p. 20.)

BURROUGHS, for Appellant.

ABBOTT and DORMAN, for Respondent.

PROCEDURE.—FORCLOSURE.—PROTHONOTARY.—JUDGMENT.

SUPERIOR COURT, Montreal, 13th October, 1860.

Coram SMITH, J.

BEAUFIELD et al. *vs.* WHEELER.

1. A judgment entered up by the prothonotary in vacation, when no act of foreclosure has been granted by him to Plaintiff against Defendant who had appeared but had not pleaded, will be set aside, on motion, as that proceeding necessary to give that officer jurisdiction has not been legally taken.

2. A Plaintiff cannot proceed *ex parte* until a valid foreclosure of the Defendant has taken place: and that can only be upon application in writing for *acte* of foreclosure and the granting and recording of such *acte* by the prothonotary.

3. A foreclosure stating that the "Defendant," forecloses the Defendant, &c., is null. (1)

After a demand of plea had been filed, and the subsequent period allowed for pleading had elapsed, Plaintiff filed a declaration to the following effect: "Defendant forecloses Defendant from pleading to this action." Plaintiff then inscribed the case for judgment in vacation, and judgment was accordingly entered up by the prothonotary. In September term, before the *quinzaine* had elapsed, ABBOTT, for Defendant, moved to set aside all the proceedings of Plaintiff subsequent to the

(1) V. art. 137 et 143 C. P. C.

filing of the demand of plea, and specially the judgment. He pointed out the fact that, by the terms of the foreclosure, it was Defendant, assuming to act by Plaintiff's attorney, who foreclosed himself; but, apart from that error, there was no right in Plaintiff to proceed *ex parte*, because no *acte* of foreclosure was demanded in writing, and none had been granted by the prothonotary. § 25 of the 12th Vic., cap. 38, is express that the effect of the omission to plead within the delays, shall be to authorise the prothonotary to grant and record *acte* of foreclosure upon *application in writing* being made for the same. Until Plaintiff was entitled to proceed *ex parte*, he could not inscribe for judgment in vacation; nor could the prothonotary enter up any such judgment. If he did so, it was an absolute nullity, as being beyond his jurisdiction; and the court must set it aside.

DEVLIN, for Plaintiff, insisted that the only mode of attacking a judgment entered up by the prothonotary in vacation, was by opposition, as pointed out by the 22nd Vic., cap. 5, § 13 and 18. By the latter section, it was enacted that, if no opposition were filed within the delay prescribed, the judgment was to become executory. This was, therefore, the only way to test the question, but, as it involved the unpleasant condition of paying the costs, Defendant had adopted a mode which the statute never contemplated and prohibited almost in terms, to avoid doing so. But the foreclosure was unnecessary. The statute allowed the prothonotary to enter up judgment, so soon as Plaintiff "is entitled to proceed *ex parte*" (22 Vic., ch. 5, § 11); now Plaintiff was entitled thus to proceed so soon as Defendant was in default to plead; which was the case if no plea was fyled within three days next after the demand of plea; and that was precisely the case here. The delay of three days had expired before the inscription for judgment had been made, and the error committed by a clerk, in filling up the foreclosure became of no consequence.

ABBOTT, in reply, contended that an opposition was the proper proceeding to set aside a judgment entered up in conformity with the law, but if Plaintiff was never entitled to proceed *ex parte*, the judgment was an absolute nullity, and might be summarily treated as such.

SMITH, J.: A question of some importance arises, as to the mode to be adopted to set aside a judgment entered up in vacation. Defendant seeks to attain this end by motion; Plaintiff contends that it can only be assailed by opposition. Probably, if the judgment in the present instance be really a judgment under the statute, Plaintiff would be right in his pretensions; but, if on the other hand it is a document prepared by the prothonotary under circumstances in which he has no

jurisdiction under the statute, the court will set the record right, on the usual summary application so to do. The statute gives this exceptional jurisdiction to the prothonotary, in cases where " Defendant has made default, or in which, for any other reason, the " Plaintiff is entitled to proceed *ex parte*," § 11. The latter is contended to be the state of things in this case. Defendant appeared, was notified to plead, and neglected to do so in time. Plaintiff then declared that *Defendant* foreclosed Defendant from pleading, but he made no application in writing for *acte* of foreclosure. The error of using the term " Defendant" would undoubtedly be fatal; but, the court desires to place its judgment chiefly on the other ground that no *acte* of foreclosure has been granted or recorded, as none was demanded. There is no possibility of doubt that a valid foreclosure is necessary before Plaintiff is entitled to proceed *ex parte;* and the court is of opinion that, without an application in writing for *acte* of foreclosure, and the consequent granting and recording of such *acte* by the prothonotary, no such valid foreclosure can take place. Plaintiff therefore was not entitled to proceed *ex parte*, when he filed his inscription for judgment: the prothonotary, in drawing and entering up a judgment on that inscription, acted without any jurisdiction or color of jurisdiction; and the judgment so drawn and entered is an absolute nullity, and a mere excrescence upon the record. Under such circumstances, the court, in the exercise of its ordinary control over its own officers and its own records has the undoubted right to order the judgment to be struck off the files, and to set aside all the proceedings of Plaintiff subsequent to the filing of his demand of plea. Judgment accordingly. (5 *J.*, p. 21.)

B. DEVLIN, for Plaintiff.

ABBOTT and DORMAN, for Defendant.

FOLLE ENCHERE.—PROCEDURE.

SUPERIOR COURT, Montreal, 26th November, 1860.

Coram MONK, J.

NYE *vs.* POTTER, *and* BROWN, Adjudicataire, *and* ANDERSON, Opposant.

Held: A motion for a *folle enchère* must contain a description of the property to be resold. (1)

Brown became *Adjudicataire* of certain property at sheriff's sale, but neglected to pay the purchase money, and the sheriff

(1) V. art. 690 C. P. C.

made his return accordingly. MACKAY, for Opposants, Anderson et al., gave notice of a motion for a resale *à la folle enchère* of Brown. ABBOTT, for Brown, *Adjudicataire*, gave notice for the same day, of an application that the sheriff be permitted to take back his return and receive the purchase money, producing with his motion, a receipt from the sheriff for the purchase money and interest. (1) ABBOTT contended that the motion for *folle enchère* must be rejected, as it did not contain any description of the property to be resold. The motion being the first step towards obtaining a *contrainte par corps* against the *Adjudicataire* should be complete in itself. This had always been acted upon by this court as being a safe rule. In *Dickinson* vs. *Bourque*, and Blanchard, 8 R. J. R. Q., p. 125, the court had refused the rule on this ground, though it was not opposed. In the forms given by the french practice books the description was always inserted. 1 Pigeau, p. 782. Ravaut, 818, 19. MACKAY insisted that there was no necessity for a description, as the schedule containing it, and annexed to the sheriff's return, was referred to in the motion, and thus every possibility of mistake as to the property was prevented. At any rate, the motion was as formal as the counter motion made on behalf of Brown, which did not contain any description of the property. He believed that the motion in this form served every purpose, and understood that numerous instances of such motions having been granted could be adduced.

MONK, J.: There is no doubt that the jurisprudence of this court has been almost, if not entirely, uniform upon the points submitted on the motions of the Opposants and *Adjudicataire* respectively: rendering necessary, in a rule for a *folle enchère*, the description of the property; and permitting an *Adjudicataire* in default to pay the purchase money, at any time before the rendering of the judgment ordering a resale. It is, perhaps, unnecessary to say that the practice appears to me to be supported by principle; as, were I of a different opinion I should not feel disposed to disturb rules of procedure so well settled. Motion for *folle enchère* rejected. (5 *J.*, p. 23.)

MACKAY and AUSTIN for Opposants, Anderson et al.

ABBOTT and DORMAN for Brown, *Adjudicataire*.

(1) V. art. 694 C. P. C.

SECURITY FOR COSTS.

CIRCUIT COURT, Montreal, 14th December, 1860.

Coram MONK, J.

TIERS et al. *vs.* TRIGG et al.

Held: That a motion for security for costs is too late when notice thereof has been given after the fourth day from the date of the appearance. (1)

This action was returned on the 22nd November, in vacation. On the 5th December, Plaintiffs demanded a plea. On the same day, Defendants gave notice that, on the first day of the ensuing term, they would move for security for costs. Motion rejected. (5 *J.*, p. 25.)

ROBERTSON, A. and W., for Plaintiffs.

POPHAM, for Defendants.

PRESCRIPTION.—COMMERCIAL MATTERS.

CIRCUIT COURT, Montreal, 31st December, 1860.

Coram SMITH, J.

ASSELIN *vs.* MONGEAU.

Held: That the plea of description of six years does not apply to an action for money lent between parties who are not traders. (2)

The Plaintiff was a "bourgeois," and Defendant an "ouvrier." The action was to recover $3 62½ cts., part of the sum of $4, lent in 1848. Defendant pleaded the prescription of six years.

PER CURIAM: This action not being for a commercial debt between traders, the judgment is for Plaintiff. (5 *J.*, p. 26.)

O'KEEFE for Plaintiff.

BONDY and FAUTEUX for Defendant.

(1) V. art. 107 et 135 C. P. C. et Règle de P. 62.

(2) V. art. 2260, § 4 C. C.

TITHES.

CIRCUIT COURT, Montreal, 14th June, 1859.

Coram BADGLEY, J.

GRAVEL *vs.* BRUNEAU.

Held: 1. That notification to the *curé* of a parish by a roman catholic who withdraws from the Church of Rome, of such withdrawal therefrom, will discharge such person from liability for tithes thereafter.

2. That such notification need not be by notarial *acte*, but may be otherwise proved.

This was an action brought by the *curé* of the parish of Laprairie to recover tithes. The declaration alleged the right of Plaintiff to receive the tithe, or 26th part of all the grain harvested by the roman catholic inhabitants of the parish of Laprairie, from lands situate within the parish; that Defendant was a roman catholic, and proprietor of a certain lot of land situate in the parish, and had, for many years, been so; that, in the year 1856, he had harvested a large quantity of grain from said farm, on which he had neglected to pay tithes to Plaintiff, who, therefore, prayed the court to condemn Defendant to render, under oath, a faithful account of the grain harvested by him, from the lot described in the declaration, in said year, and, in default of so doing, within a delay to be fixed by the court, to pay the sum of three pounds, ten shillings, with interest and costs, to Plaintiff, in lieu thereof. The Defendant pleaded, that, about the commencement of the year, 1856, he had ceased to belong to the roman catholic religion, of which Plaintiff had been then informed; that about the 17th September, 1856, he had anew given notice of this fact to Plaintiff, by a notification signified to him. The original notification was produced by Plaintiff, and was in the following form: "St-Constant, 17 septembre 1856. Messire GRAVEL, curé de Laprairie. Monsieur: Je prends la liberté de vous informer que j'ai cessé de faire partie de l'Eglise romaine. Votre serviteur très humble, BARNABÉ BRUNEAU, père." This notice was served upon Plaintiff, on a grown up person of his house-hold, on the 24th day of September, 1856, by a bailliff of the Superior Court, whose return to that effect was produced by Defendant, with a duplicate copy of the notice. The Plaintiff replied to Defendant's plea, alleging that the statement made by Defendant and contained in his plea was insufficient in law, and could not have the effect of causing Defendant to be considered as withdrawn from the roman catholic Church; that the notice itself was insufficient in not being signed by Defendant himself, and that it was illegal in that it had not been made to Plaintiff by a notarial *acte;* that, in fact, on the

24th of September, 1856, the crop of grain for that year had been harvested, and that the right on the part of Plaintiff to the *dîme* thereon had then accrued, although the payment of it was not exigible until *Pâques* of the current year, and that Defendant owed the tithe to Plaintiff for the grain harvested by him in that year. After proof and hearing, judgment was given by the court, dismissing the action. (5 *J.*, p. 27.)

DURANCEAU, for Plaintiff.

LEBLANC and CASSIDY, for Defendant,

EVIDENCE.—COMPOSITION.—RELEASE.

SUPERIOR COURT, Montreal, 31st December, 1860.

Coram SMITH, J.

BROWN et al. *vs.* Hartigan.

1° The insertion, in an agreement of composition, of a sum of money, as being the amount of the claim of a creditor, with the parol evidence of Plaintiff's bookkeeper, that such sum has been agreed upon by Plaintiff and the debtor, upon an examination of the items of the account between them in Plaintiff's books constitute sufficient evidence of such sum being due, as the balance upon an account stated.

2° If a debtor, who has compounded with his creditors, by an agreement in which they consent to accept as a composition, 10s. in the pound, payable at six and twelve months, upon payment of which they thereby declare they will discharge him from all liability, should pay one instalment of such composition, and fail to pay the other, the creditor will be entitled to sue the debtor for the original amount due less the amount of the instalment so paid.

3° And the return, by the creditor to the debtor, after the agreement of composition is signed, and before the instalments fall due, of the debtor's over due negotiable paper, to an amount exceeding the balance compounded tor ; such papers being the vouchers for a large portion of the indebtedness of the debtor ; will not constitue proof of an intention, on the part of the creditor, to discharge the debtor absolutely from the original debt, whether the notes representing the instalments be paid or not.

Roger Finn, whose executors, the Defendants were, was indebted to Brown and Childs, the Plaintiffs, on the 14th February, 1858, in the sum of $3,849.65, and being unable to meet his engagements to his creditors compounded with them, at the rate of ten shillings in the pound, payable in six and twelve months. As evidence of the agreement, the creditors signed an informal document, by which they declared that they had agreed to accept from Finn the composition in question, on payment whereof, they covenanted to discharge him from liability to them. Plaintiffs took his two promissory notes for the instalments, the first of which notes was paid, the second dishonored ; but, before the first note fell due,

Plaintiffs, at the request of Finn's agent, sent him back all his overdue paper in their possession which had matured during the previous two years, and which amounted in all to about $4,000. Finn subsequently died, and, by his will, appointed Defendants his executors. Plaintiffs, having first notarially tendered back to them the unpaid note, and demanded of them the balance of the original debt, after deduction of the amount of the first note; sued them for that balance, and, for the amount of several subsequent purchases. of goods. In their declaration, they alleged that, on the 14th February, 1858, Finn was indebted to them in the sum of $3,849.65, for goods, &c., also setting up the same amount of indebtedness in a count for an account stated. They then set up the agreement of composition; the breach of it by the non-payment of the second instalment; the tender back of the note, representing that instalment; and their right to the original claim, less the amount of the paid instalment. Additional counts were added for the amount of the new purchases. Defendants denied the allegations of Plaintiff, except as to the making of the will, and of the two notes for the composition, which they admitted. On notice to produce the Defendant produced the memorandum of agreement of composition, which was in the following terms: " We, the undersigned credi-
" tors of Roger Finn, of Quebec, in consideration of his inability
" to pay us in full agree to compound the same with him: and
" are willing to accept, in settlement of our respective claims,
" fifty cents per dollar, payable in six and twelve months from
" date, in two equal payments, and on receipt of same will give
" him a full discharge. The above is obligatory on us, only in case
" it is complied with by all the creditors of Finn." (Signed) BROWN & CHILDS, Montreal, $3,849.65, and several others. It was not signed by Finn. Plaintiffs produced several letters from Finn to them referring to the agrement, and expressing his desire and hope of being able to make the payments under it, and otherwise indicating his understanding that it was complete; also their acconut, the first item of which was under date 14th February, 1858. To balance due this day $3.849.65." Also the dishonored note, and a copy of their tender and protest; and they examined Plaintiffs' bookkeeper, who deposed to having been present when Plaintiffs and Finn, together went over his account in Plaintiffs' books, in their office, and adjusted the balance at the sum mentioned in the first item of the account and in the agreement of composition, and that it was correct. Defendants produced the notes returned by Plaintiffs and the letter which accompanied them, and it was admitted that they formed part of the debit side of the account, the balance of which was the first item above referred to.

ABBOTT, for Plaintiffs, contended that Plaintiffs' case was made out. The entry in the deed of composition, and the evidence of Root established the balance due (1 Archibold's, *Nisi Prius*, p. 273. *Porter* vs. *Cooper*, 1 Comp. M. and R. p. 394. *Prouter* vs. *Hammond*, 8 Taunt. 688) which was further proved by the notes given for half of it. One only of these notes had been paid ; and as it was evidently a condition precedent to the discharge that the composition should be paid, which had not been done, the whole debt was still due, less the amount of the first instalment which was credited as a payment on account. (Addison, *on Contracts*, pp. 1099, 1101-2 Bell's comm., pp. 472 to 504.)

BETHUNE, for Defendants, urged that the first item of Plaintiff's account being without detail of any kind, was not proved. It was not sufficient proof of a balance of account being due, to bring up a person to swear that a certain sum was so due, without furnishing any statement of the items of which such account or balance was composed. Then, the composition was final and absolute, as was indicated by the return of the evidence of debt. (2 Bell's comm., p. 506 ; Denizart, vo attermoiement.) If it had been the intention of the parties, that Plaintiffs should have the privilege of falling back upon the original claim, upon the occurrence of any contingency, Plaintiffs would have retained theirs vouchers, as proof of that debt, and would not have delivered them up, on the demand of Finn, as they have done. In England, it was held, in such cases, that, if the discharge be absolute, and part only of the instalments be paid. the creditor can only rank upon the estate of the debtor for the balance due,—(2 Bell, 472-3.)

SMITH, J. : Plaintiffs have sufficiently made out in evidence the indebtedness of Finn, and it only remains to examine the question whether that indebtedness was absolutely discharged ; or whether there was only, as contended by Plaintiffs, a conditional agreement to discharge it, the condition being the payment of the composition. The terms of the agreement produced appear clearly to indicate the latter as the true intention of the parties at the time, for, by those terms, it appears that it was upon payment of the instalments that the discharge was to be granted. This view must therefore be adopted, and the composition not having been paid, the debtor is not in a position to claim the discharge, not having performed the condition upon which he was to obtain it. The return of the overdue notes does not appear to be of sufficient significance to outweigh the construction to be deduced from the words of the agreement, though doubtless, in the absence of other means of ascertaining the intentions of the parties, that circumstance would have had its weight. Judgment must

therefore go for the original debt, less the amount paid as the first instalment of the composition. Judgment accordingly. The judge referred the counsel to the following authorities: 13 Guyot, vo *Peine contractuelle;* 3 Rép., vo *Clause résolutoire.* (5 *J.*, p. 41.)

ABBOTT and DORMAN, for Plaintiffs.

BETHUNE and DUNKIN, for Defendants.

SAISIE-ARRET AVANT JUGEMENT.—DELIBERE.

SUPERIOR COURT, Montreal, 31st December, 1860.

Coram MONK, J.

BEAUFIELD et al. *vs.* WHEELER.

1. An affidavit upon which a *saisie-arrêt* before judgment is issued, must state the cause of debt with sufficient accuracy, to enable the court to judge whether an indebtedness by the Defendant to the Plaintiff exists or not; and, if any fact material to such judgment be omitted, its absence will not be cured by the assertion of the creditor of the indebtedness of the debtor.

2. Therefore such an affidavit setting up that Defendant, at the place and date therein mentioned, was indebted to Plaintiff in the sum of money sued for; stating that such indebtedness was "for goods, wares, and merchandises, by Plaintiff, then and there, and, before that time, sold and delivered, as will appear by the account thereof to be fyled in this cause;" is insufficient, inasmuch as it does not state that the goods referred to were sold and delivered *to the Defendant.*

3. And the omission is not cured by the declaration in the affidavit, that it is the Defendant who is indebted for them. (1)

4. A motion to quash a *saisie-arrêt*, made on the fourth juridical day of the term next after its return, is in time. (2)

5. If notice be given by the same party for the same day, of two motions in the same cause, and that first argued be taken *en délibéré*, the second will be received and fyled, that its argument may be proceeded with after the first is disposed of.

The Plaintiffs procured a writ of *saisie-arrêt simple* to issue before judgment, against Defendant's effects, upon the affidavit of one of them, to the effect that, on a day, and at a place named therein, Defendant was indebted to Plaintiff in a sum of money also named, "for the price and value of goods, wares, and merchandise, by Plaintiff, then and there sold and delivered, as will appear by the account thereof to be fyled in this cause." The writ was returned into court, about the beginning of September, 1860. A plea was demanded in due course and was not fyled. An informal foreclosure was put in, and judgment entered up by the prothonotary, on the 13th of September. On the same day that the Defendant moved to

(1) V. art. 834 C. P. C.

(2) V. art. 819 et 854 C. P. C.

set aside the judgment, namely the 22nd of September (see *ante* p. 3), ABBOTT, for Defendant, put in a motion to quash the writ of *saisie-arrêt*, but the former motion having been first submitted; DEVLIN, for Plaintiff, objected to the latter being received, as the case was then *en délibéré*. ABBOTT submitted that his motion must be received, though the argument of it need not be proceeded with; as he had given notice of it for that day, and could not be placed in a worse position by the fact of the court taking time to consider his previous motion. SMITH, J., ordered the motion to be received and fyled; that it might be heard and disposed of as soon as the application *en délibéré* had been adjudicated upon. On the 27th of October, the judgment having been set aside; ABBOTT for Defendant, moved to quash the writ of *saisie-arrêt*, on the ground that the affidavit did not shew to whom the goods were sold, for the price of which the action had been brought. Our statute originally required "proof on oath to the satisfaction of a judge," of the indebtedness of the Defendant. (Rev. Stat., p. 96.) Though the formal sanction by the judge of the issue of the writ was not now required, the nature of the proof exacted, was not changed. The party now took the responsibility of issuing and serving his writ. The sufficiency of the "proof on oath" of his claim, was now only submitted to the scrutiny of the court, but it was not less necessary than before, that such proof should be satisfactory, which expression meant that it should satisfy the requirements of law with regard to such proof. One of these requirements and one of the most essential, was that the circumstances essential to the existence of an indebtedness, should all be stated directly and positively. The question of indebtedness was to be determined by the application of the rules of law to the circumstances which had occurred, or to the contracts which had been made, between the parties. It was in reality an inference of law, the grounds for which the court was entitled to know, and of the correctness of which they could not judge without knowing those grounds. Certainly, one of the most important of them was, that the contract should have been originally made between Plaintiffs and Defendant; or, if not, that the precise nature of the facts supposed to create a liability on the part of a Defendant, not a party to the original contract, should be stated with the precision. In this case, it was not stated that the goods in question were sold and delivered to Defendant; and, without knowing whether they were or were not, and, if not, on what ground Defendant is sought to be charged with them the court cannot judge whether he is liable for them or not. The proof, therefore, is clearly not such as could legally satisfy any court or judge of the existence of any debt. A

large number of decisions upon analogous points, in affidavit for a *capias*, are to be found in the english reports, and, as the reasons given in those cases are strictly applicable to the affidavit now under discussion, it is considered proper to cite those of them that appear to be similar to the present. See, therefore, *Perks* vs. *Severn*, 7 East, 194 ; *Cathrow* vs. *Hagger*, 8 East, 106 ; *Young* vs. *Gatien*, 2 M. and S., 602 ; *Taylor* vs. *Forbes*, 11 East. 315 ; *Fenton* vs. *Ellis*, 6 Taunton, 191 ; *Pitt* vs. *New*, 8 B. and C. 645 ; *Pontifex* vs. *DeMaltzoff*, 1 Exc., 435 ; *Reeves* vs. *Hucker*, 2 C. and J., 44 ; *Edwards* vs. *Dick*, 3 B. and Ad., 495. Our courts have hitherto been quite as strict as the english, in the construction of similar affidavits. See *Alexander* vs. *McLachlan*, 5 R. J. R. Q., p. 362 ; *Gale* vs. *Brown*, 3 R. J. R. Q., p. 475 ; *Cuthbert* vs. *Barrett*, 2 R. J. R. Q., p. 463, turned chiefly upon a similar objection, and in this case judge Duval expressed his approbation of the reasoning of Lord Ellenborough on some of the cases above cited. DEVLIN for Plaintiffs, urged that the application came too late. The Defendant had allowed the time fixed for pleading to expire and himself to be foreclosed ; and had also permitted four days of the term to expire before he made his motion. These applications were always required to be made *in limine litis*, and it was contrary to all rule that, after a judgment had been rendered against Defendant, he should be permitted to move to set aside the *saisie-arrêt*. The doctrine on this subject had received very full examination in England, and it was not well settled that any delay, beyond the usual time for pleading, or any act done by Defendant in the *interim*, deprived him of the right to move to quash. I Term. Rep., 330. And, here, the rule was the same, *Marchand* vs. *Cinq-Mars*, 5 *R. J. R. Q.*, p. 143. In this latter case, the motion was rejected as too late, though it happened to have been made on exactly the same day in the term as the present. In the case now before the court, Defendant had not only allowed a long delay to elapse, but had taken another proceeding in the mean time, having moved to set aside the judgment rendered in the cause. But, in reality, there was no necessity to set up any ground or cause of action at all. It was enough to swear that a debt of sufficient amount was due. This was established by the form given by the statute, Rev. Stat., p. 139, and there was no enactment to the contrary, or expressly requiring it. The objection made was frivolous in the extreme. All pleadings with us are in good faith, and are favourably construed. There could be no possible doubt upon the mind of any one that the meaning of the affidavit was, that the goods had been sold to Defendant : and, in fact, that was its legal construction, for it said that Defendant was in-

debted, and he could not have been indebted if the goods had not been sold to him. It was of no avail citing as authority here either english or canadian precedents, with regard to writs of *capias*. There, the liberty of the subject was compromised, and every proceeding in restraint of that liberty was rigidly scrutinized. ABBOTT replied that he had made the motion to quash in the first term after the return of the action, and had taken no steps in the mean time, other than to set aside the judgment, without which he could not have move to quash at all. The case of *Marchand* vs. *Cinq-Mars* was erroneously reported, the real ground of the judgment in that case being, that the motion was based upon reasons which could only form the subject matter of an *exception à la forme*. (The record was here produced and the judgment read to the court in support of this assertion of the counsel.) The form given in the Rev. Stat., p. 139, was only to be used for a temporary purpose, and the writ issued upon such an affidavit became null, if another writ did not issue in the regular course within a limited time. Besides, the act was not in force. It was true that the authorities cited referred only to writs of *capias*, but the distinction between such a writ and one of *saisie-arrêt* before judgment, was only one of degree. It was admitted that acts affecting the liberty of the subject were, and ought to be, rigidly scrutinized; but surely freedom in the use of one's own property, was little less sacred in the eye of the law than the freedom of one's own person; and acts affecting the one or the other were equally odious.

MONK, J.: The writ must be quashed for the insufficiency of the affidavit in not stating to whom the goods were sold. It is essential, for many reasons, that all the facts supposed to justify the inference of indebtedness should be set up in an affidavit of this description, and particularly for the reason that the liability of a person to be arrested, or to have his effects attached before judgment, should not depend upon Plaintiff's construction of the law, but upon that of the court. It is obvious also, that by exacting from parties making such affidavits, an exact and precise statement of action, more than one beneficial result is attained, for a creditor is thereby rendered more cautious in making them, and in the event of their being false, an indictment for perjury would be more easily sustainable. Judgment accordingly. (5 *J.*, p. 44.)

ABBOTT and DORMAN, for Defendant.

DEVLIN, for Plaintiffs.

FEMME MARIEE.—OBLIGATION.

COUR SUPÉRIEURE, Montréal, 31 décembre 1860.

Coram BADGLEY, J.

SHEARER *vs.* COMPAIN et uxor.

Jugé : Qu'un billet promissoire d'une femme séparée de biens, signé conjointement et solidairement avec son mari, dans le but de se rendre caution pour lui, est nul quant à elle, en vertu de la section 36e de l'Ordonnance des Hypothèques, 4 Vict., c. 30. *Semble* que, si elle était marchande publique, et que, si la dette avait été contractée pour le fait de son commerce, elle serait obligée au paiement, quoique le mari l'eût contractée et que la femme fut séparée de biens. (1)

Le Demandeur réclamait du Défendeur Sébastien Compain, et de sa femme Catherine Mary Howard séparée de biens et marchande publique de Montréal, la somme de $288.75 montant de leur billet promissoire. La Défenderesse plaida : 1° Que le billet avait été signé par elle sans aucune valeur. 2° Que la considération du billet était une dette personnelle de son mari dont elle était separée de biens. La Défenderesse prouva que le billet sur lequel l'action avait été intentée avait été donné par les Défendeurs conjointement, en renouvellement d'un autre billet du Défendeur Sébastien Compain en faveur du Demandeur, et que la considération de ce dernier billet était une somme égale à celle qui y était portée, à savoir, $288.75, que M. Compain devait seul à Olivier Garceau, pour ouvrages faits au *Cosmopolitan Hotel*, et que Garceau avait transportée à Shearer. Le Demandeur interrogea la Défenderesse sur faits et articles, et le Défendeur comme témoin. Mais le seul fait qu'il put mettre en preuve est que le *Cosmopolitan Hotel* était loué par Mme Compain et non par M. Compain.

BADGLEY, J. : C'est une cause où il est impossible de rendre justice aux parties. La preuve du côté de la Défenderesse est parfaite ; d'un autre côté, le Demandeur n'a pas prouvé que Mme Compain ait retiré quelqu'avantage des ouvrages qui ont été faits au *Cosmopolitan Hotel*, et qui forment la considération du billet promissoire de M. et Mme Compain ; ni qu'elle faisait elle-même les affaires de l'hôtel en question. Le fait qu'elle est la locataire de la maison, n'est pas suffisant pour engager la cour à condamner la Défenderesse, et elle doit s'en tenir à la rigueur de l'ordonnance des hypothèques qui prohibe les promesses et engagements de la femme séparée de biens pour son mari. L'action est déboutée quant à la Défenderesse. (5 *J.*, p. 47.)

DUNBAR BROWNE, pour le Demandeur.

CARTER et GIROUARD, pour la Défenderesse.

(1) V. art. 1301 C. C.

PROCEDURE.—PLAIDOYERS.—MINORITE.

SUPERIOR COURT, Montréal, 31 décembre 1860.

Coram BERTHELOT, J.

CRUMP *vs.* MIDDLEMISS.

Jugé : Qu'un mineur peut plaider par une exception péremptoire en droit, le défaut d'assistance d'un curateur ou tuteur. (1)

Cette action est en dommages, contre un mineur sans être assisté d'un curateur ou tuteur. Le Défendeur prit avantage de cette informalité par une exception péremptoire en droit. Le Demandeur fit motion pour le renvoi de ce plaidoyer, soutenant que le défaut d'assistance du curateur aurait dû être invoqué par une exception à la forme, dans les délais prescrits par la pratique de la cour et en faisant le dépôt exigé par la loi.

PER CURIAM : La motion du Demandeur est mal fondée. C'est un principe consacré par les auteurs, et, entre autres, par Pigeau, qu'un mineur peut toujours faire connaître le fait de sa minorité, et que les cours doivent lui permettre de la plaider, aussi bien que le défaut d'assistance de curateur, quel que soit, d'ailleurs, l'état de la procédure dans l'instance. C'est un vice qui entache le fond même de l'action, et qu'elles ne peuvent refuser de noter en tout temps. Motion rejetée. (5 *J.*, p. 48.)

MACKAY and AUSTIN, pour le Demandeur.

CARTER and GIROUARD, pour le Défendeur.

ENQUETE.—PROCEDURE.

COUR SUPÉRIEURE, Montréal, 24 janvier 1861.

Coram SMITH, J.

MACNAMARA *vs.* MEAGHER.

Jugé : Que la Cour siégeant aux séances d'Enquête n'a pas le pouvoir de rejeter une forclusion et une inscription à l'Enquête et de permettre au Défendeur de plaider. (2)

Le 17 décembre dernier, le Défendeur était forclos de plaider, et, plus tard, le 4 janvier courant, la cause était inscrite sur la rôle des enquêtes pour la preuve *ex parte.* Le 22 du même mois, le Défendeur signifia au Demandeur l'avis d'une motion pour qu'il lui fût permis de plaider, et que la forclusion

(1) V. art. 14 et 116 C P. C.

(2). V. art. 238 C. P. C.

fût déchargée, de même que l'inscription à l'enquête. Son Honneur M. le Juge Smith renvoya l'application. La cour, dit-il, n'a pas de discrétion à exercer dans les circonstances présentes. Supposé que le Défendeur ait quelque titre à cette discrétion, il ne peut la demander qu'à la Cour Supérieure siégeant en terme, et non pas à l'enquête. Motion renvoyée. (5 *J.*, p. 49.)

CARTER et GIROUARD, pour le Demandeur.

B. DEVLIN, pour le Défendeur.

CAPIAS.

COUR SUPÉRIEURE, EN CHAMBRE, Montréal, 28 juin 1858.

Coram BADGLEY, J.

LANGLEY *vs.* CHAMBERLAIN.

Jugé : 1° Que recéler des propriétés immobilières avec intention de fraude, est une raison suffisante pour obtenir un bref de *capias ad respondendum.*

2° Qu'il importe peu que le recèlement ou la fraude soit commis, lorsque la déconfiture du débiteur était publique et notoire, ou seulement lorsqu'elle était inconnue et ignorée du public. (1)

Le 14 mai 1858, le Défendeur était arrêté sur *capias ad respondendum.* L'affidavit contenait, entre autres chefs, que le Défendeur " hath secreted and made away with his individual " estate, debts and effects, with intent to defraud his creditors." A l'enquête qui eut lieu sur la requête du Défendeur, la preuve produite par le Demandeur montra que les biens personnels dont le Défendeur avait disposé, étaient des immeubles sis en la cité de Montréal et dans la paroisse de Nicolet ; qu'il en avait disposé, six mois avant que sa déconfiture fût connue du public et le *capias* émané de la cour, à savoir, le 6 novembre 1857 ; qu'à cette dernière époque, le Défendeur était, à sa connaissance personnelle, insolvable, et qu'il contemplait une banqueroute imminente. Le Requérant soutint que cette raison n'était pas suffisante sous le statut ; que le transport d'immeubles ne pouvait, dans aucune circonstance, être considéré comme un recèlement. Le juge Badgley renvoya l'objection et décida que la disposition de biens immobiliers, faite dans le but de frauder, est un moyen de recèlement, et, enfin que le temps qui s'était écoulé depuis que le Défendeur avait disposé de ses immeubles ne pouvait pas préjudicier au droit du Demandeur, mentionnant, en même temps, que décider autrement serait mettre entre les mains des débiteurs de mauvaise

(1) V. art. 797 et 798 C. P. C.

foi, des moyens et des ressources de frauder leurs créanciers. Requête rejetée et writ maintenu. (5 *J.*, p. 49.)

ED. CARTER, pour le Demandeur.

BETHUNE and DUNKIN, pour le Requérant.

ATTACHMENT BEFORE JUDGMENT.

Montreal, 24th January, 1861.

Coram SMITH, J.

MACNAMARA *vs.* MEAGHER.

Held : That an affidavit for a writ of *saisie-arrêt* not alleging that the work was done " at the request of the Defendant," but alleging an acknowledgment of the debt, *v. g.*, a promissory note was sufficient. (1) (5 *J.*, p. 49.)

CARTER and GIROUARD, for Plaintiff.

B. DEVLIN, for Defendant.

DAMAGES.—MALICIOUS PROSECUTION.—ADMISSION IN PLEADINGS.—NEW TRIAL.

SUPERIOR COURT, Montreal, 30th November, 1860.

Coram BERTHELOT, J.

MONTY *vs.* RUITER.

Held : That, in an action for false imprisonment, the admission of Defendant, in one of his pleas, is sufficient proof of his having caused the arrest of Plaintiff, although another of the pleas is the general issue, and that such an admission relieves Plaintiff from the necessity of making other proof of the fact.

This was a judgment upon a motion for a new trial. The action was one of damages, for malicious arrest and false imprisonment. The issues were tried before a special jury, on the 11th day of June, 1860. The case for Plaintiff was closed, without any further proof of Defendant's complicity in the arrest of Plaintiff complained of, than was afforded by the production of the indictment upon the back of which Defendant's name was endorsed as witness. The court was then moved by DOHERTY for Defendant, that, there being no proof of Defendants having caused Plaintiff's arrest, as complained of, his client should not go on his defence.

DALY, for Plaintiff, contended that : 1st, That the evidence

(1) V. art. 834 C. P. C.

of Schiller, deputy clerk of the crown, and the production of the original record of the Queen's Bench proved sufficiently the part Defendant had taken in causing the arrest and prosecution ; 2ndly, That the fact of Defendants having caused the arrest of Plaintiff was admitted specially in Defendant's pleas, in the following terms: " " true it is that he caused " Plaintiff to be arrested, as alleged in the declaration, but not " with the aggravating circumstances therein alleged," that the fact should be taken as proved, by reason of the above admission, and that no necessity existed of otherwise establishing by evidence what had not been traversed in the pleadings, but, on the contrary, had been specially admitted to be true. 3rdly, The *défense en fait* fyled by Defendants did not constitute a plea of not guilty, which could put in issue the fact of Defendants causing the arrest, or which could necessitate proof of that fact, because the *défense en fait*, though containing a denial of the facts alleged in the declaration, did not traverse the fact of the arrest, but denied every thing except as admitted in the first plea.

SMITH, J., presiding at the trial, said : That the pretension of Defendant's counsel was well founded, and charged the Jury to return a verdict for Defendant, on the grounds : 1st, That there was no proof of the affidavit of Ruiter, the original not having been proved, that, neither the signature of Ruiter nor the taking of the oath had been proved ; 2ndly, That it was not proved that the arrest was made by virtue of the affidavit of Ruiter ; 3rd, That there was no proof that the indictment was laid before the Grand Jury at the instance of Ruiter or that he even appeared before the Grand Jury as witness ; 4th, That the mere fact of Ruiter's name being on the back of the bill of indictment did not prove that he was examined, still less that he was the private prosecutor ; 5th, That the production of the original bill of indictment, and affidavits by Schiller, as being in his possession as officer of the Court of Queen's Bench, and as having been laid before the Grand Jury, offer no proof of these facts ; 6th, That the admission in plea that Plaintiff had been arrested by Defendant, but not in the manner set out in the declaration, which was specially denied, was no proof that the affidavit set out in the declaration was made by Defendant, or that the arrest took place on that affidavit. In compliance with this charge, the Jury returned a verdict for Defendant. In the following term of the Superior Court, a motion for a new trial was made, on behalf of Plaintiff, on the grounds: That the charge of the Hon. Mr. Justice Smith who presided at the trial was a misdirection and contrary to law. At the argument, Plaintiff's counsel mainly urged that the charge had been contrary to

law, inasmuch as the Judge instructed the Jury that the admission contained in the pleadings was not sufficient evidence of the fact that Defendant had caused the arrest of Plaintiff.

BERTHELOT, J.: In rendering judgment, said that he felt bound to grant the motion, considering, as he did, that the express admission contained in Defendant's plea, wherein he says " true it is that he caused Plaintiff to be arrested as " alleged in the declaration, but not with the aggravating cir- " cumstances therein alleged " to be an admission of the fact so complete, and decided that Plaintiff was not absolutely bound to make further proof of the fact so admitted. That the rules of pleading were very clear upon this point, and that, in his opinion, Plaintiff had, by virtue of this admission, sufficiently proved his case. That, at the same time, the other documentary proof and the evidence of Mr. Schiller would not of themselves have been sufficient evidence. That, in consequence, therefore of the law regarding admission in the pleadings as proof of the facts admitted, he considered that the jury had been misdirected and that a new trial should be granted. Motion granted. (5 *J.*, p. 50.)

LAFLAMME, LAFLAMME and DALY, for Plaintiff.

M. DOHERTY, for Defendant.

F. CASSIDY, Counsel.

PROCEDURE.—PLEADINGS.

CIRCUIT COURT, Montreal, 31st December, 1860.

Coram MONK, J.

HOBBS, JR., *et al. vs.* HART *et al.*

Held: That an endorser of a note pleading a want of notice of protest is not bound to file an affidavit to that effect under the terms of the statute 20 Vict., cap. 44, when it appears, by the certificate written by the notary himself, that the notice he served was utterly useless and null. (1)

This was an action on a promissory note against the maker and endorser. Defendants separated on their defence. The endorser, McDonald, pleaded that he had received no notice whatever of the protest of the note which he had endorsed. The declaration set forth that McDonald resided in Montreal, and that he had been duly notified of the protest of the note. McDonald's plea was fyled without any affidavit to support his allegations, as required by the judicature act of 1857. Defendant's plea denied that there had been any notice of

(1) V. art. 52 C. P. C.

protest given to him, and that, therefore, he was not liable. At the argument, Daly, for Plaintiff, contended that the plea of Defendant had been fyled without any accompanying affidavit as prescribed in the judicature act of 1857, section 87, wherein it is enacted " and, if, in any such action, any Defen- " dant shall deny his signature, or any other signature or " writing to or upon such bill note, *cédule*, check, promise act " or agreement, or the genuineness of such instrument, or of " any part thereof, or that the protest, notice and service there- " of (if any be alleged by the Plaintiff), were regularly made, " whether such denial be made by pleading the general issue " or other plea, such instrument and signatures shall never- " theless be presumed to be genuine and such PROTEST, NOTICE " and SERVICE to have been regularly made, unless, with such " plea, there be fyled an affidavit of the Defendant, or of some " other person acting as his agent or clerk, and cognizant of " the facts in such capacity, that such instrument or some " material part thereof is not genuine or that his signature " or some other to or upon such instrument is forged or " that such protest, notice and service were not regularly " made and in what the alledged irregularity consists." That, under the terms of the statute, Defendant could not attack the regularity or genuineness of the notice and service of protest, without fyling, with his plea, an affidavit setting forth in what the irregularity of the notice of protest consisted. That the words of the statute were positive, that Defendant had not complied with the requirements of the law by fyling an affidavit, and that the plea should be dismissed, and judgment rendered against Defendant. DOHERTY, for McDonald, contended that the certificate of the notice of protest showed on the face of it an absolute nullity. The notary certified to having posted a notice in the Montreal post office directed to Ottawa, whilst it was not alleged that McDonald ever had his domicile in Ottawa. This, by the notary's own showing, proved the notice of protest to be utterly worthless. That there was no necessity of fyling an affidavit in support of his plea, because Defendant complained, not of a mere irregularity, but of the entire absence of any notice of protest whatever.

MONK, J., in rendering judgment, said, that the action was brought on a promissory note, against the maker and endorser of a promissory note, both of whom were alleged in the declaration to reside in Montreal. Plaintiff alleged the due protest of the note, for non-payment, and the notice thereof to Defendant McDonald. Defendant pleaded that he had had no notice of the dishonor of the note. By the protest itself it appeared that the notary had given notice, by putting a letter in the Montreal post office directed to Ottawa, whilst it was no

where alleged that McDonald had ever resided in that city. This was no notice at all; the letter might as well have been sent to China. But Plaintiff's counsel had raised the question whether Defendant, to render his plea of want of notice available, was not bound to fyle an affidavit, as required by the terms of the Judicature Act of 1857. A recent decision, in a somewhat similar case of *Chamberlain* vs. *Ball*, in the Court of Appeals, had been referred to, and, if the circumstances in both cases had been the same, he would have followed that decision in this case; but there were important differences. The statute did not go so far as the circumstances of the present case required it should; it enforced the fyling of an affidavit, when any regularity of the note or protest was in question, but not when, upon the face of it, the notice of protest was plainly a mere nullity. The affidavit was only necessary when Defendant rsted his objections upon facts which he might have to prove. When his defence was a mere denial that Plaintiff hade made out his case, he thought there was no need of an affidavit. The affidavit he regarded as the foundation of some affirmative and substantive proof which he might have to make to support his defence. The clause of the statute and the decisions in appeal could not be made to apply to this case and as there was plainly a want of notice to the endorser, he dismissed the action against Defendant McDonald. Judgment for Plaintiff against Defendant Hart. (5 *J.*, p. 52.)

LAFLAMME, LAFLAMME and DALY, for Plaintiff.

M. DOHERTY, for Defendant McDonald.

SECURITY FOR COSTS.

SUPERIOR COURT, Montreal, 31st December 1860.

Coram MONK, J.

SCOTT et al. *vs.* AUSTIN, and YOUNG et al. (Intervening.)

Held: That an Intervening Party whose domicile is beyond the limits of the province is bound to give security for costs. (1)

This was a motion on the part of Plaintiffs that, inasmuch as it appeared by the intervention fyled, that the Intervening Parties resided beyond the limits of the province, they should be held to give security for the costs that might be taxed against them. The Intervening Parties had come into the cause, to take up the *fait et cause* of Defendants, and contest the action of Plaintiff. The proceedings they had commenced on their own behalf would lead to the incurring of further costs

(1) V. art. 29, C. C.

in the cause, and upon this ground Plaintiff had made his motion.

MONK, J., decided that the motion should be granted, and Intervening Parties held to give security for the costs that might be taxed against them in favor of Plaintiffs. (5 *J.*, p. 53.)

LAFLAMME, LAFLAMME, and DALY, for Plaintiff.

A. and W. ROBERTSON, for Intervening Parties.

PENAL ACTIONS.—PRESCRIPTION.

SUPERIOR COURT, Montreal, 31st December, 1860.

Coram SMITH, J.

HANDSLEY, qui tam, *vs.* HENRY MORGAN, *and* THE SAME *vs.* JAMES MORGAN.

Held: That, in an action under the statute 12 Victoria, ch. 45, for non-registration of partnership, where the offence is alleged to have been committed five years, or longer, previous to the institution of the action, there is no prescription under the Statute 52 Geo. III, ch. 7, intituled "An act for limitting the time during which penal actions may be brought in the courts of this province," as the offence is continued from day to day. (1)

These were two actions simultaneously brought by Plaintiff *qui tam*, for the penalty of £50, against Defendants, for having carried on business together, without enregistering their declaration of copartnership under the Statute 12 Victoria, ch. 45. Defendants, in each action, contended that, by the statute under which the action was brought, merchants trading in partnership were bound to enregister their declaration of partnership within six months from the time of their commencing so to carry on business; that, after the expiry of six months, an action accrued to any informant Plaintiff *qui tam;* that, by the declarations, Plaintiff had alleged the offence to have been committed in the year 1853; that, since that date, more than three years had expired, and that, under the Statute 52 Geo. III, ch. 45, a limitation of the action had operated in favor of Defendants. Plaintiff proved the fact of Defendants having carried on business together in partnership, and also the non-enregistration, in the registry office for the county of Montreal, of any declaration of partnership. At the argument, CARTER and DALY, for Defendants, urged that, by the act 52 Geo. III, ch. 7, for the limitation of penal actions, it was enacted that, if any action suit or information for any offence against any penal statute or law, made or to be

(1) V. art. 2615 S. R. Q.

made, should be brought after two years from the time when the offence was committed, that then the said action or suit should be void and of no effect. By the declaration, it appeared that Defendants had traded in partnership for five years and upwards, that the action had accrued to Plaintiff, and the offence had been committed more than three years previous to the institution of these actions by Plaintiff. That, by the last cited statute, the offence and penal action were prescribed and void. That the statute contained no reservation of any particular penal actions, but plainly referred to all penal actions and suits. BEDWELL, for Plaintiff, contended that the action for a penalty for non-registration of partnership was an action for an offence which was continuous in its nature. That there could be no prescription of a penalty for an offence which was being committed by Defendants every day that they allowed their declaration of partnership to remain unregistered. That, even many actions might be brought for the same penalty, by reason of Defendant's continuing to neglect the registration of their partnership, and that the offence was one which continued from day to day and was not prescriptible as pretended by Defendants.

SMITH, J. : In rendering the judgment, said that the non-enregistration and the trading in copartnership had been clearly made out. That the terms of the statute 12 Victoria, ch. 45, were precise and positive, and that Defendants having through an oversight neglected to register their partnership, must nevertheless be condemned to pay the penalty named by the statute. He said that there were no grounds to support the plea of prescription which had been urged by Defendants, by virtue of the Statute 52 Geo. III, ch. 7. The limitation of actions and suits for penalties alluded to in that statute could not be made to apply to the present actions, because the offence for which the present actions were taken was continuous and did not cease until Defendants had enregistered their partnership, which they had not done until after the institution of the present actions. Judgment for the Plaintiff in both cases (5 *J.*, p. 54.)

BEDWELL, for Plaintiff.

LAFLAMME, LAFLAMME and DALY, for Defendants.

PROMISSORY NOTE ON DEMAND.

CIRCUIT COURT, Montreal, 31st December, 1860.

Coram MONK, J.

SHUTER *et al. vs.* PAXTON *et al.*

Held: That the amount of a *bon* payable on demand, by a Lower Canada debtor to a foreign creditor, is recoverable with costs in Lower Canada, by the creditor, without proof of any demand before institution of action. (1)

MONK, J.: This is an action on a bon payable by Defendant, resident in Lower Canada, to Plaintiff resident at New-York. Defendant, by his plea, declared that he was always ready to pay the amount, and brought the money into court praying that the tender might be declared good, without costs. I have made inquiry as to the practice of the court, and have to decide that a tender of the money after institution of the action without costs is not sufficient. It was the duty of the debtor here to find his creditor wheresoever he might be and pay him. Judgment for Plaintiff, with costs. (5 *J.*, p. 55.)

A. and W. ROBERTSON, for Plaintiff.

BONDY, for Defendant.

GUARDIAN.—CONTRAINTE PAR CORPS.

CIRCUIT COURT, Montreal, 30th June, 1851.

Coram Bruneau, J.

BLACKISTON *vs.* PATTON, *and* PATTON, Mis en cause.

Held: That a rule for *contrainte par corps* against a guardian to effects seized, will be discharged on his shewing that they had been sold under other executions. (2)

A rule was taken against the guardian *Mis en cause*, praying that inasmuch as he had failed to produce the articles seized, when required so to do, that he be committed to the common gaol of this district, until he paid Plaintiff's debt and costs. On the 24th April, 1851, FLEMING, on behalf of the *Mis en cause*, appeared, and pleaded that the guardian was unable to produce the greater part of the effects seized, they having been sold under other executions issued at the suit of Defendant's creditors, and stating that the guardian was and always had been ready to produce the articles remaining in

(1) V. art. 145 C. P. C., et s. 86 du chap. 33 des S. du C. de 1890, 53 V.

(2) V. art. 577, 578 et 597 C. P. C.

his possession. LAFRENAYE, on the part of Plaintiff, contended that it was not a sufficient answer, and that the guardian should have opposed the sale under the other executions, on the ground that they were already seized, and that he had been named guardian. The case having been taken *en délibéré* on the 30th June, Mr. Justice BRUNEAU delivered judgment discharging the rule taken against the *Mis en cause*, on the ground that the effects seized had been already sold under executions issued against Defendant, at the suit of his creditors, and that the *Mis en cause* was no longer in a position to produce them. (5 *J.*, p. 56.)

LAFRENAYE, for Plaintiff,

FLEMING, for Mis en cause.

FRAUD.—SALE OF MOVEABLES.

CIRCUIT COURT, Montreal, 19th February, 1861.

Coram BADGLEY, J.

LOVELL *vs.* FONTAINE, and ST. AMAND, Opposant.

Held: That an *opposition à fin de distraire*, to a writ of *venditioni exponas* affecting moveables, claiming the goods under an alleged sale, will be dismissed, on motion, where the goods were under seizure at the time of sale, and there was no delivery under the sale.

Opposant fyled an opposition *à fin de distraire*, claiming the goods seized, as having purchased the same from Defendant. Plaintiff moved to reject the Opposition, on the grounds, that the effects claimed were under seizure, at the instance of Plaintiff, when the pretended sale took place; that, at the time of the sale, an opposition fyled for Defendant, by the now Opposant, his attorney, was still pending; that no deplacement was averred; and that the opposition was frivolous and vexatious. The court granted the motion, and His Honour, in delivering the judgment stated that the fyling of oppositions of a frivolous character to writs of *venditioni exponas*, in the Circuit Court, had become an evil of such magnitude that the court were determined to put a stop to the practice. Opposition dismissed. (5 *J.*, p. 71.)

TORRANCE and MORRIS for Plaintiff.

L. J. B. NORMANDEAU for Opposant.

RETRAIT LIGNAGER.—TENDER.—PROCEDURE.

QUEEN'S BENCH, Montreal, 13th October, 1847.

Coram ROLLAND, J., GALE, J., DAY, J.

DANSEREAU *vs.* COLLETTE.

Held : That, in an action *en retrait lignager*, the omission to state in the bailiffs' return certifying the service of the writ of summons, and the *offres* therein mentioned, the residence or domicile of the bailiff, or the domicile, the names, surnames and "qualités" of the persons who accompanied him as his records, is fatal to Plaintiff's demand. (1)

2. That such omissions may be pleaded, in an action *en retrait lignager, au fond*, and not merely by preliminary exceptions *à la forme*.

Plaintiff's *demande* was *en retrait lignager*. The *first* exception of Defendant which was maintained by the court, set up, that, in the bailiff, Louis Dequoys' return, annexed to the writ of summons, for the purpose of certifying the service of the summons and the "offres" therein mentioned, no mention is made, 1st, of the residence or domicile of the bailiff, 2nd, of the domicile, the names, surnames, and "qualités" of the persons who accompanied him as his recors. And the conclusion to these exceptions was: "Que le Demandeur soit déclaré "déchu du droit de retrait, et débouté de sa dite action, avec "dépens."

GALE, J., pronounced judgment as follows: The exceptions adverted to would be *exceptions à la forme*, in any other action, but, in actions *en retrait lignager*, they are not *merely* exceptions à la forme, they are, in effect, *virtually* and potentially, exceptions *au fond qui entraine la déchéance du droit du Demandeur*. The authorities of Pothier, Duplessis, Guyot, and others concur in this, and, consequently, in stating that such exceptions, in the matter of retrait, are not required to be pleaded in *limine litis*, like ordinary *exceptions à la forme*, but, as they say, may be pleaded *en tout état de cause*, and, without question, they may, therefore, be pleaded whenever a plea to the *fond* could be brought forward, as in the present instance they have been. The law, in matters of *retrait lignager*, has transformed the nature of these exceptions from the *forme* to the *fond*, and all the incidents and privileges which belong to the nature they have assumed, must pertain to them, and, by the authorities, are declared to pertain to them. "And what are the formalités prescrites, in

(1) Par le st. du C. de 1855, 18 V., ch. 102, s. 1, le retrait lignager et ses accessoires et conséquences furent abolis, et le titre septième de la coutume de Paris, ainsi que les trente et un articles qui le composaient furent et demeurèrent supprimés et abrogés, nonobstant toute loi, usage ou coutume à ce contraires. Cette abrogation fut reproduite dans le ch. 53 S. R. B. C. Cependant les codificateurs ont donné l'article 710 C. C. comme de l'ancien droit.

" actions *en retrait lignager?* Anc. Den. 3,514. Il faut d'abord " dans la coutume de Paris, que l'exploit en retrait exprime " s'il est donné avant ou après midi, l'huissier, doit d'ailleurs, " y être accompagné de deux records qui doivent signer avec " lui l'original, et la copie de l'exploit en retrait doit aussi con- " tenir les noms, surnoms, qualités et demeures des dits records. " Il faut suivre la formalité servilement. " Ici, c.-à-d., dans l'instance de retrait: les épines dont on a entouré cette matière commencent à se faire sentir; elles deviennent encore plus fortes dans l'exécution de ce droit: ainsi, le retrait étant de rigueur, s'il y a nullité dans l'exploit, il y a absolue déchéance, principe général dont on va voir les conséquences par le présent chapitre. De ce principe il s'ensuit: 1. que l'exploit doit être libellé suivant les articles 79 et 80 de l'Ordonnance de 1539 et de celle de 1667; 2. qu'il doit être signifié à la personne ou à son domicile, avec mention à qui il a été laissé tant dans l'original que dans la copie; 3. il doit être fait en présence de deux témoins, qui doivent signer tant l'original que la copie; et que mention doit être faite dans l'exploit de leurs noms, surnoms, qualités et demeures; 4. l'huissier doit être capable d'exploiter dans le lieu et il doit signer tant l'original que la copie, l'omission d'une seule de ces formalités emporte déchéance absolue, etc. Voici une première suite de cette rigueur, cette déchéance est si absolue, que le retrayant qui a failli ne peut plus réitérer son action par un nouvel exploit ou nouvelle demande; " il y serait non recevable;" to which the author adds, "ce qui est plus rigoureux que juridique. Par arrêt de règlement du 5 juillet, 1614, et du 15 juin 1637, il est enjoint aux sergents d'exprimer dans leurs exploits en matière de retrait, les noms, surnoms, qualités et demeures des parties; et ces dispositions ont été confirmées par trois autres arrêts qu'on trouve pareillement à l'endroit cité, le premier est du 7 septembre 1632, il déclare nul un extrait de retrait, pour le défant de déclarer les qualités et demeures des deux records, nonobstant qu'il fût signé d'eux tant en l'original qu'en la copie, et qu'on justitia par écrit qu'il y avait plusieurs années qu'ils demeuraient à Paris et étaient reconnus pour gens de bien et d'honneur. Le second, en date du 8 mars 1637, met hors de cour une demande en retrait parce que l'exploit bien que signé des records, tant en l'original que copie, ne contenait point la déclaration de leurs qualités et demeures." These *arrêts* became part of the law of Canada, on the introduction of the regal government in the province, when the authority of the *Compagnie de la Nouvelle-France* was suspended, and these laws have not been changed here, although, according to some authorities, the édit du mois d'août 1699, et la déclaration du mois de mars 1671, dont l'une établissait le contrôle, was held

to alter the law in the *prévôté* of Paris; which opinion, as to its changing the law even in Paris, was however denied by others, and, in the doubt, it was held, the only safe course, to observe the whole formalities even in the vicomté of Paris. But, with regard to Lower Canada, the doubt could not exist, because the edit and declaration supposed by some to have effected a change in the old law at Paris was never registered in this province, and the formalities before mentioned constituted both previously, and, for some time subsequently to the promulgation of the *Code civil,* the indispensable and inviolable law in the jurisdiction of Paris. The cases, in which these *arrêts* declared the nullity of the *demande en retrait,* apply completely to the case before us, for they were faulty in precisely similar points to some of the deficiencies in the action now before us, although the present action is still more unfavourable, for it exhibits a greater number of such nullities, namely, not only the omission of the *qualité et demeure,* but also of the name of the records and other matters. But, even a more striking example of the rigor of the rule than in the *arrêts* already cited is given in Denizart, where, although all else was in form, both in the original and copy of the *exploit,* yet, in consequence of one of the witnesses (records) being designated in one instance only in the body of the copy by his christian name, and although he had signed both his christian and surnames, an *arrêt* was rendered, declaring the *déchéance* of the right of retrait, and this *arrêt* was pronounced so late as the 3rd December, 1762. In the matter before us, the defects are many, and, according to the rigorious principles which have been held sacred in the decision of similar actions, these defects are insurmountable. They have likewise been held and declared so in other cases which have been heretofore decided in the courts of this province." C'est un principe," says Guyot, vbo *Retrait,* p. 568," consacré depuis longtemps que l'omission de la moindre des formalités prescrites pour l'exercice du retrait *fait* déchoir le retrayant, mais ce principe d'où dérive-t-il? C'est cette raison innée qui seule forme des lois, c'est elle qui a appris au jurisconsulte comme au praticien, au magistrat souverain comme au juge subalterne, que le retrait *gênant le commerce et offensant le droit naturel,* (c'est-à-dire le droit de disposer de ses biens), devait être regardé partout comme odieux, et que partout on ne pouvait en obtenir l'effet que par une observation stricte et littérale de tout ce qu'il fallait pour y parvenir." There are certain words in some instruments which are considered *sacramentels,* and no equivalents will supply their omission, such as the terms *dûment autorisée de son mari,* in deeds where the husband and wife are parties; in like manner, there are some

formalities so consecrated in relation to some actions, however unimportant they might be deemed in other actions, that no implication, or inference, no substitution of other modes or forms, can supply their place or compensate for their omission. Of this description are those which are omitted in the present case. The law of *retrait lignager* has been termed an unfavorable law, but some, whose reference for authority may be deemed too fastidious, object that there is an impropriety in applying such a designation and distinction to *any laws* which are in force, it being the duty of judges to execute, not to censure, the laws. There might be some ground for such an objection, if all laws bore equally the stamp of wisdom and justice; but, as it has disastrously happened in all countries that some laws have been injurious, although many may have been beneficial, they have generally become subjected in turn to that test, which the authority cited calls, " cette raison innée qui seule forme des lois: qui apprend au jurisconsulte comme au praticien, au magistrat souverain comme au juge subalterne, s'ils protègent la liberté, ou s'ils offensent le droit naturel." And, thus we find Judge Blackstone declaring from that " raison innée " that some laws in force in his time were a disgrace to the statute book, and Dumoulin denouncing some of the provisions of the code under which he lived (some of which provisions so denounced still form part of the law amongst us) as being *contra legem Dei et legalitatem proximis debitam.* Thus, we find that, in every country, there were some laws which were denominated favorable and others unfavorable. It would be absurd to hold them all as possessing equal claim to observance or to veneration. The english laws when they regulated the price of wines, or cloth or other goods, without regard to their abundance or scarcity, could scarcely be deemed as *deserving of observance* as the laws of the same country which permitted freedom of agency, and the laws of Constantine which punished the innocent offspring for the faults of their parents, would surely have been less entitled to strict enforcement than those which made individuals responsible only for their own offences. It is consequently in accordance with the theory of jurisprudence, and has been the practice of all ages and countries, for the highest tribunals to which of necessity must belong the enforcement of the laws, to recognize the distinction between favorable and unfavorable laws, and to exercise latitude in their interpretation, so as to extend the influence of the one and to restrain the operation of the other. And the courts of France, considering the law of retrait lignager as an unfavorable law, injurious to commerce and retraining natural rights, have hedged and fenced round the exercise of this law with all the

formalities, *arrêts* and regulations which have been cited, in order to diminish its too easy and injurious application. And, if I were even entitled to exercise an unlimited discretion, instead of being restricted by rules, I cannot perceive any justice or propriety in the relaxation of the rigid forms which have hitherto guided the courts in matters of *retrait lignager*. It would be strange, were we in America, in the nineteenth century, to give new efficacy to those restraints upon the freedom of agency and commerce which were considered as too obstructive for the principles of despotism existing in France in the fifteenth century. The reasons of rigour and stringency which have influenced the Courts of France in these matters, in by gone ages, exist in far greater force in this country. The judgment of the majority of the court is that: The action be dismissed, and Plaintiff be declared *déchu de son droit de retrait lignager*. "The Court, considering the peremptory exception by Defendant firstly pleaded to the present action, to be good and well founded, doth, in conseqence, declare Plaintiff to be barred from the right of *retrait*, "*déchu du dit droit de retrait*," claimed by the present action, and doth dismiss the action." (5 *J.*, p. 71.)

J. U BEAUDRY, for Plaintiff.

LAFONTAINE and BERTHELOT, for Defendant.

PROCEDURE.—PLEAS.

SUPERIOR COURT, Montreal, 30th November, 1860.

Coram S. C. MONK, A. J.

TORRANCE *vs.* CHAPMAN et al.

Held: That a special replication by a Defendant to a special answer of a Plaintiff is irregular. and that the special matter therein will be rejected on motion of Plaintiff to that effect, where the said special matter could have been regularly pleaded by the plea of Defendant. (1)

The Plaintiff moved the Court to strike out the special matter of the special replication of Defendants to Plaintiff's special answer, chiefly on the ground that it properly formed portion of the pleas of Defendants, and was unnecessarily alleged by a special replication. POPHAM, *contra* cited the case of *Morrison* vs. *Kierskowski*, 4 *R. J. R. Q.*, p. 218. The Court granted the motion. (5 *J.*, p. 75.)

TORRANCE and MORRIS for Plaintiff.

POPHAM for Sinclair and McLennan.

(1) V. art. 148 C. P. C.

PROMISSORY NOTE.—ENDORSER.—DECLARATION

SUPERIOR COURT, Montreal, 21st February, 1861.

Coram BADGLEY, J.

HELLIWELL *vs.* MULLIN.

Held : That, in an action against the endorser of a promissory note payable in three months, the allegation of the making of the note on the 11th of July 1860, by error in place of the 16th, and the protesting of the same on the 19th October, 1860, will not be covered by the subsequent allegation of the promise of the indorser, after protest, to pay the amount to Plaintiff, and that a demurrer to such declaration is well founded. (1)

The Plaintiff's declaration averred the making of the note on the 11th of July, by error, in place of the 16th, in an action against the endorser, and, after alledging the protest and notice to the endorser, averred a promise to pay made by Defendant subsequent to protest. On demurrer by the endorser, the court held that the demurrer was well-founded, and that the alleged promise of Defendant, subsequent to the protest, could not cover the defect. The Plaintiff was allowed to amend, on payment of the costs of the demurrer. (5 *J.*, p. 76.)

ROSE and RITCHIE, for Plaintiff.

M. DOHERTY, for Defendant.

CONTRAINTE PAR CORPS.

COUR DE CIRCUIT, Montréal 18 février 1861.

Coram BADGLEY, J.

THOMAS *vs.* PEPIN, *et* PEPIN, fils, Opposant.

Jugé : Qu'une *règle* pour mépris de cour peut émaner contre la partie, pour avoir produit plusieurs oppositions de la même nature, dans le but de retarder une vente, et de s'opposer à l'exécution de la justice. (2)

L'Opposant avait produit, à l'encontre du writ d'exécution émané contre les biens-meubles du Défendeur, trois oppositions *afin de distraire* consécutives. Le onze février, 1861, jour où la troisième opposition était fait rapportable, le Demandeur fit motion pour obtenir *une règle* contre la partie elle-même, George Pepin, fils, l'Opposant, tendant à le faire déclarer coupable de mépris de cour, " en autant que l'Opposant avait,

(1) V. art. 30 C. P. C.

(2) V. art. 2273 C. C.

" en violation des règles de pratique et des formes de procé-
" dure suivies par cette cour, produit trois oppositions afin de
" distraire, à l'encontre du writ d'exécution émané en cette
" cause, et des procédés de l'huissier, l'Opposant renouvelant
" telles oppositions en violation de la loi, et s'opposant par là
" à l'exécution de la justice et des jugements de ce tribunal."
La cour prit la cause en délibéré, et, par son jugement du 18 février 1861, accorda la motion du Demandeur, et, en conséquence, ordonna l'émanation d'une règle pour mépris de cour contre l'Opposant, rapportable le 11 mars 1861, et déclarée absolue le 12 mars, Coram BERTHELOT, J. (5 *J.*, p. 76.)

BÉTOURNAY et RICARD, avocats du Demandeur.

DRUMMOND et BÉLANGER, avocats de l'Opposant.

ENREGISTREMENT.

COUR DE CIRCUIT, DISTRICT DE TERREBONNE,
Saint-Jérôme, 21 janvier 1861.

Coram MONK, J.

GRENIER *vs.* CHAUMONT.

Jugé : Que de deux actes enregistrés à la même heure, ce n'est pas le numéro qui donne la priorité, mais que, dans l'espèce, le plus ancien titre aurait dû être enregistré avant le nouveau. (1)

En 1850, Gauthier consent une obligation à Dame veuve Granger, de Sainte-Anne, avec création d'hypothèque sur un emplacement décrit à l'acte. Gauthier fit divers paiements en acompte du capital et des intérêts. Le 13 novembre 1859, Gauthier entre en marché de vendre l'emplacement hypothéqué, au Défendeur Chaumont; celui-ci va s'informer s'il y a des hypothèques enregistrées au Bureau d'Enregistrement contre cet emplacement; il n'y en a pas. Le 13 novembre 1859, la Demanderesse ayant eu connaissance que l'emplacement devait être vendu, fait connaître à Chaumont, le Défendeur, l'existence de son obligation, et qu'il lui est encore dû une balance d'argent. Le 14 novembre 1859, étant un dimanche, l'acte de vente entre Gauthier et Chaumont est fait et signé, bien que daté du 13, et, ce jour-là, (le 14), le fils de la Demanderesse fait de nouveau connaître l'existence de l'hypothèque à Chaumont. Cependant la vente par Gauthier à Chaumont est faite purement et simplement. Le 14 novembre 1859, l'employé de la Demanderesse se rend au Bureau d'Enregistrement du Comté de Terrebonne, à Saint-Jérôme, et délivre entre les mains du Député Registrateur une expédition

(1) V. art. 2083 C. C.

de l'obligation pour être enregistrée ; le lendemain, le 15, à 9 heures du matin, celui-ci l'accepte. Le lendemain, le 15, à 9 heures du matin, Chaumont présente son titre d'achat que le Régistrateur reçoit et enregistre, sous le numéro 10,512, et il enregistre ensuite l'obligation de la Demanderesse, sous le numéro 10,513 ; les deux enregistrements ont été faits à 9 heures du matin, ainsi que le comporte le certificat d'enregistrement de chaque acte. L'action fut dirigée contre Chaumont, en déclaration d'hypothèque, en alléguant qu'il avait eu connaissance de l'existence de l'obligation, et que l'enregistrement avait été fait en temps utile et de manière à lier le Défendeur. Le Défendeur a plaidé que son titre ayant été enregistré antérieurement à celui de la Demanderesse, il était tiers-acquéreur *bonâ fide*, subséquent, et, conséquemment, ayant les conditions voulues, il avait droit de faire déclarer que la Demanderesse n'avait plus d'hypothèque.

PER CURIAM : Les faits sont prouvés. Chaumont a eu connaissance de l'hypothèque avant son achat, l'obligation de la Demanderesse aurait dû être enregistrée avant l'acte de Chaumont, puisque le Régistrateur l'avait reçue avant celui de Chaumont. Les numéros ne peuvent déterminer, dans tous les cas, la date des enregistrements, mais l'heure où ils le sont ; dans l'espèce, si le Régistrateur, au lieu de donner le numéro antérieur à l'acte du Défendeur, l'eût donné à l'obligation, il n'y aurait eu aucune difficulté, car les deux actes ont été enregistrés à la même heure, et, de fait, l'obligation aurait dû être enregistrée avant la vente du 14 novembre 1859, et le Défendeur a eu connaissance de cet enregistrement le matin qu'il a eu lieu. Le Régistrateur aurait dû enregistrer l'acte le plus ancien en date, puisque tous les deux étaient présentés à la même heure. Jugement pour la Demanderesse. (5 *J.*, p. 78.)

GÉDÉON OUIMET, pour la Demanderesse.

W. PREVOST, pour le Defendeur.

AUTORITÉS DU DÉFENDEUR : 4 Vic. chap. 30, Sees. 1 et 4 ; Baudot, *Formalités hypothécaires*, tome 1, p. 69, No. 64 ; Bonner, *Registry Law*, p. 17.

ENREGISTRATION.

COURT OF QUEEN'S BENCH, IN APPEAL FROM THE CIRCUIT COURT, DISTRICT OF TERREBONNE.

Montreal, 4th March, 1862.

Coram Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

JOSEPH CHAUMONT (Defendant in Court below), Appellant, *and* MARIE-ANGÈLE GRENIER (Plaintiff in Court below), Respondent.

Held: That a deed creating a mortgage, passed since the registry ordinance came into force, is invalid, as against a subsequent purchaser, unless it be enregistered before the title of such purchaser.

Semble.—That two deeds, one of which was deposited with the registrar on Sunday, and the other at the opening of his office on Monday morning, are to be considered as enregistered *at the same moment of time*, so that one will have no preference over the other by virtue of registration; and that, if the former be a deed of mortgage, and the latter a deed of sale, the former is inoperative, void, and of no effect against the latter.

Semble.—That the more ancient date of one of two deeds placed, at the same time, in the hands of the registrar, gives to it no priority in respect to the time of enregistration.

The facts of this case are stated in the report of the judgment of the court below, *supra* p. 34, which was reversed in appeal.

MEREDITH, J.: There cannot be any doubt that the mere knowledge of an unregistered incumbrance will not bind a party whose claim is duly registered, *Ross* and *Daly*, 3 *R. J. R. Q.*, p. 469 et seq., and in the present case. the pleadings do not accuse the Appellant of fraud of any kind. The parol evidence, therefore, in so far as it tends to prove that Appellant knew of the unregistered incumbrance in favor of Respondent, was, to say the least, useless. The portion of the parol evidence which tended to prove that Respondent's obligation was placed in the hands of the registrar, on sunday, the 14th November, 1858, might also have been objected to, as there was no *inscription en faux* against the registrar's certificate. But, even according to the parol evidence adduced, the registrar was right in treating, as he did, the obligation in favor of Respondent, as if it had been placed in his hands at the opening of his office on the morning of monday the 15th of November. The Respondent, it is true, could not gain any advantage by placing her obligation in the hands of the registrar at a time when, according to law, his office was closed; but, on the other hand, I do not think Respondent can suffer, in any way, from the registrar having received her mortgage a few hours before she had a right to place it in

his hands. According, therefore, to the certificates of the registrar, which, as to their legal effect, are not opposed to the parol evidence, the two deeds must have been considered to have been placed in the hands of the registrar, at the same moment; and, such being the case, it seems to me plainly impossible that the registrar could, at his own mere will and pleasure, give one of the parties precedence over the other. I therefore regard the two deeds as having been, in contemplation of law, registered at the same time. Viewing the case in this light, Respondent contends that, as the two deeds were registered at the same time, the first in date ought to be held the first in right; or, in other words, that, as the two deeds were registered at the same time, neither party ought to be considered to have acquired, under the registry law, any right against the other. And therefore, it is argued by Respondent, this case ought to be decided irrespective of the provisions of the registry law; and, consequently, that the prior hypothec of Respondent should be held good against the subsequent sale to Appellant. This reasoning is not without force; and, as regards deeds executed before the registry law came into operation, it seems to be well founded; because, as to such deeds, the law in effect declares that the deed first in date, shall be inoperative against the second, only in the event of the second being enregistered before the first. The words of the law, as regards deeds executed *before* the registry law came into operation, are as follows: "But every such notarial "obligation, contract, instrument in writing, &c., which was "not registered on or before the day last mentioned, shall be "and has been from the said day inoperative, void, and of no "effect whatever, against any subsequent *bonâ fide* purchaser, "grantee, mortgagee, &c., for or upon valuable consideration "whose claim has been registered before the registration of "such obligation, instrument or document as aforesaid." Con. Stat., L. C. cap. 37, sec. 3, sub.-sec. 2, p. 344. But the law is essentially different as regards deeds executed after the registry ordinance came into operation. The provision of law as to the class of deeds last mentioned is as follows: "And every "such deed or instrument in writing, &c., shall be inoperative, "void and of no effect, against any subsequent *bonâ fide* pur-"chaser, &c., for or upon valuable consideration, unless it has "been registered *before* the registering of the deed, instru-"ment in writing, &c., under which such subsequent purcha-"ser, grantee, mortgagee, &c., claims." Con. Stat. L. C., cap. 37, sec. 1, sub.-sec. 2, p. 343. Here the legislature has in effect declared that a deed although prior in date to another, shall be inoperative, void, and of no effect against it, viz., against the subsequent deed, unless the deed, so prior in date, has been re-

gistered *before* the registering of the second deed. In the present case, as I have already observed, the two deeds before us were registered *at the same moment of time.* It therefore does not appear that the first deed has been registered *before* the registering of the second ; and therefore according to the express words of the law, the first deed " is inoperative, void, and of no effect " as against Appellant, a subsequent *bonâ fide* purchaser, for valuable consideration. It is not for us to decide whether there is any sufficient reason for the distinction made by the legislature between the two classes of deeds to which I have adverted ; but, I may observe that in a case between two claimants under deeds in force when the registry ordinance was passed, and not registered within the delay allowed by law, but subsequently registered at the same time, neither party under the provisions of the registry law, could justly claim to have any advantage over the other ; because both, as to negligence and diligence, they would be exactly upon the same footing : whereas in the case of two deeds passed subsequently to the registry law coming into operation, but at different dates, and registered at the same time, the holder of the second deed, as the more diligent of the two claimants might, perhaps, according to the principles of the registry law, be entitled to a preference over the other. For instance in the case before us, Respondent, as holder of the first in date of the two deeds, neglected to register her claim for more than ten years ; whereas Appellant registered his deed at the earliest moment possible. We are not however required to determine upon the wisdom or justice of the provision of law under consideration. It is sufficient for us to know that as regards deeds passed since the registry law came into force, and in cases such as the present, the law declares in effect that a deed prior in date to another, shall be inoperative against it, unless registered *before* it. The deed of Respondent is prior in date to that of Appellant, notwithstanding which it was not registered before it ; and therefore as has been already said, Respondent's obligation must be held inoperative as against Appellant's deed of sale.

MONDELET, J. : Appel d'un jugement rendu par la Cour de Circuit du district de Terrebonne (Monk, juge), le 21 février, 1861. Une action hypothécaire ayant été intentée par la Demanderesse Intimée, contre l'Appellant pour £13 15s. 5d., fondée sur une obligation du 9 mars 1848, enregistrée le 15 novembre 1859, à neuf heures du matin. L'Appellant, Défendeur, opposa à cette action, un acte d'acquisition de la propriété en question, en date du 14 novembre 1858, enregistré le 15 novembre 1858, à 9 heures du matin, sous le No. 1053. *Question.* Deux actes comportant respectivement hypothèque sur le même immeuble, sont

enregistrés simultanément. Le régistrateur certifiant leur enregistrement à la même heure, donnant à l'un (l'acte d'acquisition) le No. 10512, et à l'autre (l'obligation) le No. 10513, le titre de l'acquéreur ainsi enregistré détruit-il la priorité de l'obligation ? L'on voit que la prétention de l'Appelant, est qu'ayant acquis l'immeuble en question, par acte du 14 novembre 1858, temps auquel il n'existait alors, ni même lors de l'enregistrement de ce titre d'acquisition, aucune réclamation enregistrée, la Demanderesse-Intimée n'avait aucune hypothèque qui pût valoir contre lui, et que l'action devait être déboutée. Le Défendeur a plaidé des impenses ; il n'en peut être question ici, attendu que non seulement cet objet excèderait la juridiction de la Cour de Circuit, mais parce que dans notre droit, différant, sous ce rapport, du droit romain, le tiers détenteur n'a pas droit de rétention de l'héritage jusqu'à ce qu'on lui ait payé ses impenses ou ses améliorations, dont il doit se faire payer en se faisant colloquer dans l'ordre de distribution, sur le prix de l'héritage, lorsque la vente a eu lieu par décret. Revenant à la question d'enregistrement, nous avons en regard deux enregistrements faits à 9 heures du matin. L'obligation est plus ancienne, 19 mars 1848, l'acquisition subséquente, 14 novembre 1858. Mais l'acte d'acquisition porte enregistrement sous le No. 10512, et l'obligation 10513. " Je certifie que ce " document a été filé et enregistré en entier à ce bureau, à neuf " heures A. M., le 15 novembre 1858, sous le numéro dix mille " cinq cent douze " (No. 10512). Voilà quant à l'acte d'acquisi- " tion. " Je certifie, etc., sous le numéro dix mille cinq cent " treize) " (No. 10513). Tel est le certificat quant à l'obligation. Le jugement de la Cour de Circuit, dont est appel, ne renferme aucun motivé exprès et spécial à l'occasion de cette question, mais comme il maintient l'action hypothécaire,et condamne l'acquéreur au délaissement, la question qui est maintenant soumise à la Cour d'Appel, a été virtuellement résolue dans le sens de la Demanderesse, c'est-à-dire, que bien que l'enrégistrement de l'acquéreur porte le No. 10512, et celui de l'obligation 10513, le droit d'hypothèque subsiste. Je ne fais aucune difficulté de dire, que le jugement dont est appel, est bien fondé en loi. J'aurais préféré que la Cour de première instance, n'eût pas admis la preuve testimoniale qu'elle a reçue quant à ce qui s'est passé en dehors de l'enregistrement qui a eu lieu le lundi matin, 15 novembre 1858, à 9 heures. Cette preuve n'est pas légale, et il n'en était aucunement besoin. J'aurais aimé à voir dans le jugement le débouté des exceptions du Défendeur qui a été omis. Quant à la question d'enregistrement, il faut partir du principe que ces enregistrements ont pour fin la conservation, et non pas la destruction furtive des droits des individus, et que dans ces opérations, on

n'exige pas plus que dans aucune autre, des impossibilités physiques. Il était en effet, impossible, mathématiquement, d'effectuer l'entrée au registre du sommaire sur chaque acte, et bien que le régistrateur certifie qu'il les a enregistrés à 9 heures du matin, cette déclaration, ou constate le fait, alors l'acquéreur n'a pas de priorité, ou elle atteste purement et simplement, que la présentation des deux actes ayant été simultanée, le régistrateur s'est conformé à la loi en donnant à chaque acte un numéro, aux termes mêmes de l'acte 4 Vict., chap. 30, sec. 19. (Statuts refondus, chap. 37, sec. 60, p. 368). "Tout sommaire ou document enregistré dans "tel régistre sera numéroté, et le jour, le mois, l'année et "l'heure du jour où il est enregistré seront entrés à la marge "du régistre." Avant la promulgation de l'article 2147 du code Napoléon, l'on eût peut-être pu entrevoir quelque difficulté, si on eût mis la raison de côté ; mais un moment de réflexion suffit, pour faire saisir, de suite, que le seul sentiment bien fondé en pareille matière, est celui qu'on a adopté en France, savoir : "que tous les créanciers inscrits le même jour, "exercent en concurrence une hypothèque de la même date, "sans distinction entre l'inscription du matin et celle du soir "quand cette différence serait marquée par le conservateur." On trouve dans Merlin (4e édition, Rép., vbo *Inscription hypothécaire*, t. 6, § 5, II) "Plusieurs hypothèques de même ou de différente nature, peuvent être cumulées sur un seul immeuble ; et les divers créanciers auxquels elles appartiennent, peuvent venir s'inscrire simultanément. La priorité de l'hypothèque attribuée à celle de l'inscription, aurait pu faire naître des difficultés. Cet article les prévient. Il ne veut pas, dans ce cas, que la priorité de l'hypothèque soit réglée, ni par celle de l'écriture, ni par l'instant mathématique où l'acte a été présenté à l'inscription : il attribue une hypothèque de même date et du même rang à tous les créanciers inscrits le même jour sans distinction entre l'inscription du matin et celle du soir, quand bien même cette différence se trouverait précisée par le conservateur." Rien de plus raisonnable et de plus juste que ce point de vue le plus conforme au bon sens. Appliquant à la question dont nous nous occupons, les principes sus-énoncés, on ne peut hésiter à dire que la Cour de Circuit de Terrebonne, a agi avec sagesse, en rendant le jugement dont est appel. Je ne dirai rien du fait de la remise par l'Intimée au régistrateur de son obligation, dans la soirée du 14 novembre, veille des enregistrements, car j'ai déjà remarqué que la cour de première instance, n'aurait pas dû recevoir cette preuve ; si cependant , l'on voulait appeler à son secours, le *fantôme d'équité,* comme le dit Toullier, ne pourrait-on pas soutenir que c'est l'Intimée qui, la *première* a présenté ou fait

présenter son titre, et qu'elle eût dû obtenir le numéro 10512, au lieu du numéro 10513, que le régistrateur a accordé à l'Appelant ? Mais je n'attribue aucune importance à cette circonstance. J'opine donc pour la confirmation du jugement de la cour de première instance.

La majorité de la Cour d'Appel a maintenu la prétention de l'Appelant par le jugement qui suit : " La cour, 1° considérant que, par la deuxième section de l'ordonnance de la quatrième année du règne de Sa Majesté la reine Victoria, chapitre 30, il est statué que tout titre ou instrument par écrit exécuté après le 31 décembre 1841, sera considéré comme sans force, nul et de nul effet, à l'égard de tout subséquent acquéreur *bonâ fide*, pour ou sur valable considération, à moins que tel titre n'ait été enregistré avant l'enregistrement du titre, transport ou obligation notarié, sur lequel se fondera tel acquéreur subséquent : 2° considérant que la demande de l'Intimée en cette cause est basée sur une obligation en date du 9 mars 1848, en vertu de laquelle, l'immeuble décrit aux pièces de procédure en cette cause, a été hypothéqué en faveur de l'Intimée ; considérant que l'Appelant a acquis le dit immeuble par acte de vente notarié en date du 14 novembre 1858, pour les prix et considérations portés dans le dit acte, et que conséquemment, le dit Appelant est, vis-à-vis l'Intimée et relativement au dit immeuble, un acquéreur de bonne foi, pour valable considération ; 3° considérant que le dit acte d'obligation et le dit acte de vente ont été enregistrés dans le même temps, et considérant que le dit acte d'obligation en date du 9 mars 1848, n'ayant pas été enregistré avant le dit acte de vente en date du 14 novembre 1858, doit, en vertu des termes exprès de la deuxième section de la dite ordonnance d'enregistrement, être regardé comme nul et sans effet à l'égard de l'Appelant, acquéreur subséquent de bonne foi, et pour valable considération ; et que, conséquemment, il y a erreur dans le jugement de la cour de première instance qui a maintenu la dite obligation contre le dit Appelant ; infirme le jugement rendu par la Cour de Circuit pour le comté de Terrebonne, siégeant à St-Jérôme le 21e jour de janvier 1861, et procédant à rendre le jugement que la cour de première aurait dû rendre, renvoie la demande et action de l'Intimée contre l'Appelant, avec les dépens encourus tant en la cour de première instance que devant cette cour." Le juge en chef et le juge Mondelet différant (9 *J.*, p. 208 et 12 D. T. B. C., p. 125.)

LAFLAMME, LAFLAMME et DALY, pour l'Appelant.

MOREAU, OUIMET et MORIN, pour l'Intimée.

DISQUALIFICATION OF JUDGES.

COURT OF QUEEN'S BENCH, Montreal, 2nd March, 1859.

Coram Sir L. H. LAFONTAINE, Bart., C.-J., AYLWIN, J., DUVAL, J., CARON, J.

On the question whether the appointment of Mr. Justice Caron, as Commissioner under 20 Vic., c. 43, had rendered him incompetent to sit as one of the Judges of the court, the court was divided in opinion.

LAFONTAINE, J. C.: L'acte de 1849, chap. 37, qui a rapport à la juridiction de cette cour, contient la disposition suivante: "Aucun des dits juges, c'est-à-dire des juges de cette cour, ne "siégera dans le Conseil exécutif ou législatif, ou dans l'As-"semblée législative, ni ne tiendra aucune autre charge lu-"crative sous la Couronne." Une disposition semblable se trouve dans l'acte de judicature de 1849, ch. 38. L'acte de 1852, ch. 13, qui concerne la nomination de juges assistants dans la Cour Supérieure, dit: "It shall be lawful for the go-"vernor, *if he shall see fit*, to appoint, &c." Voilà comment la législature s'exprime, quand elle veut ôter aux mots *it shall be lawful*, leur effet obligatoire; elle ajoute *if he shall see fit.* Dans l'acte seigneurial de 1854, 18 Vict., ch. 3, sec. 16, art. 10, il est dit que, si pour tenir un terme, soit de cette cour, soit de la Cour Supérieure, il devient nécessaire de suspendre les séances de la cour seigneuriale, les juges ajourneront la dernière cour à un jour convenable, après la fin du susdit terme. Ici la législature reconnaît que les juges en pied, composant la cour seigneuriale, pourront continuer de tenir les termes de leurs cours respectives. L'article ajoute: "*It shall be lawful for the Go-"vernor*.... to appoint assistant judges of the said courts, "or *of either of them*, during the pendency of any such spe-"cial session, (la cour seigneuriale.)" Les mots *either of them*, laissent au gouverneur la faculté de ne nommer des juges assistants qu'à une seule des cours. Le pouvoir d'ajourner la cour seigneuriale, pour tenir des termes des autres cours, comportait par lui-même la rétention de celui des juges de continuer à siéger dans leurs cours respectives, même durant la cour seigneuriale. Les mots ajoutés *either of them*, ôtent, de plus, aux mots *it shall be lawful*, leur effet obligatoire, du moins, en autant qu'il s'agissait de l'une des deux cours. C'est ce qui a eu lieu pour la nôtre. Durant la cour seigneuriale, aucun juge assistant n'a été nommé. Aussi, nous avons continué d'avoir et d'exercer le pouvoir d'ouvrir et de tenir la Cour d'Appel. Il est vrai que nous n'avons pas entendu de causes. Cela a été le résultat de l'exercice d'un pouvoir discrétionnaire, de notre part, justifié par le fait évident que, si on eût entendu des causes comme à l'ordinaire, il n'y aurait pas

eu de fin à la cour seigneuriale. Toujours est-il que l'acte seigneurial, par ses propres termes, ôtait aux mots *it shall be lawful*, l'effet obligatoire qu'ils étaient destinés à avoir, du moins quant à cette cour, après la nomination de juges assistants dans la cour supérieure. Tel est le langage dont la législature s'est servi *in pari materiâ*, dans des circonstances semblables ou analogues à la présente. Que dit l'acte de codification ? " If any such Judge be appointed, it shall be lawful " for the governor to appoint an assistant Judge, for and du- " ring the time that the Judge appointed a commissioner un- " der this act shall continue to be such commissioner ; and " every assistant Judge so appointed shall, during the said " time, have and exercise all the powers and authority and " perform all the duties by law vested in or assigned to a " Judge of the court of which he shall have been appointed an " assistant Judge, as if he had been appointed a Judge of " such court." Ce langage est bien différent de celui des deux autres statuts. Il ne présente pas de termes dont on puisse inférer qu'on ait voulu laisser au gouverneur aucune discrétion à exercer. Dans les deux premiers statuts, les mots *it shall be lawful*" sont accompagnés d'expressions qui en modifient le sens, en leur ôtant leur effet obligatoire. Dans le dernier, l'omission de toutes telles expressions leur conserve cet effet. Telle doit avoir été l'intention de la Législature, autrement,elle se serait servie de termes qui n'eussent comporté qu'un pouvoir facultatif, et non impératif. " When, in several statutes " *in pari materiâ*, the Legislature is found sometimes inserting " and sometimes omitting a clause of relation, it is to be presum- " ed that their attention has been drawn to the point, and that " the omission is designed. But, if it were not intended, said " Lord Ellenborough, in *R.* vs. *Skow*, we can only say of the " Legislature *quod voluit, non dixit.*" (Dwarris, on *Statutes*, p. 707.) " The words may probably go beyond the intention, " says Lord Tenterden, but if they do, it rests with the Legis- " lature to make an alteration, the duty of the court is only " to construe and give effect to the provision." (Ib). " Words of " permission shall in certain cases be obligatory. When the " statute directs a thing to be done for the sake of justice, " the word *may* means the same as the word *shall*. The " stat. 23 H. VI, c. 10, says the sheriff may take bail ; but the " construction has been that he shall be bound to bail. So, if a " statute says that a thing *may* be done, which is for the " public benefit, it shall be construed that it must be done." (Dwarris, p. 712.) " Negative words *will* make a statute imperative ; and it is apprehended affirmative *may*, if they are absolute, explicit, and peremptory, and show that no discretion is intended to be given." (Ib., p. 715). " Judges are

" not *to presume* the intentions of the Legislature, but to " *collect them* from the words of the Act of Parliament; they " have nothing to do with the policy of the law." (Ib., p. 703.) Ceci est une réponse directe à plusieurs des arguments de M. Loranger. " As one part of a statute is properly called in, to help the construction of another part, and is fitly so expounded, as to support and give effect, if possible to the whole, so is the comparison of one law with other laws made by the same legislator, or upon the same subject, or relating expressly to the same point, enjoined for the same reason and attended with a like advantage. (Ib., 699).... And the rule, it is said, equally applies, though some of the statutes may have expired, or are not referred to in the other acts. " It is a " rule in the construction of statutes, said Lord Mansfield, " that all which relate to the same subject, notwithstanding " some of them may be expired or are not referred to, must " be taken to be one system and construed consistently." (Ib., p. 700.) L'acte de 1852, l'acte seigneurial de 1854, et l'acte concernant la codification, autorisent la nomination de juges assistants. C'est une autorité donnée par chacun de ces statuts *in pari materiâ*. Le législateur, néanmoins, ne s'est pas servi des mêmes termes, en donnant cette autorité au gouverneur. Par les deux premiers, l'autorité est facultative, tandis que les termes de l'acte de la codification sont impératifs. Telle est la différence que le législateur lui-même a faite. On nous a parlé d'instructions que le gouverneur avait données, on pouvait donner aux commissaires, comme devant servir de base à l'interprétation que nous devions donner aux statuts. Je suis convaincu que, sur réflexion, l'honorable M. Loranger, regrettera d'avoir eu recours à ce moyen. L'exécutif est appelé à exécuter les lois, et les juges à les interpréter; et cette interprétation nous ne la recevons pas, nous ne devons pas la recevoir de l'exécutif. S'il en devait être autrement, il n'y aurait plus de garantie pour le sujet. Ces instructions sont révocables à volonté ; elles peuvent être dans un sens aujourd'hui, et demain dans un autre. Ces instructions, nous ne les connaissons pas ; peut-être ne verront-elles jamais le jour. Dussent-elles le voir, ces instructions ne sauraient être que purement ministérielles, changeables à volonté. Il faudrait donc dire, en admettant la force que l'on prête à ces instructions, que l'interprétation à donner au statut devra également changer en même temps et toutes les fois qu'on jugera à propos de changer ces instructions ! Impossible de soutenir une telle proposition ; elle est contraire à l'indépendance des juges ; elle demande des *services*, et non des *arrêts*. L'honorable M. le Juge Carou a accepté la charge de codificateur. Sa commission est émanée. Elle est *gazettée*. Du reste, il déclare lui-même

qu'il a accepté la charge. Il n'a pu l'accepter que sous l'autorité du statut, avec toutes les conséquences de cette acceptation et non avec le profit de modifications que l'on fait résulter d'instructions purement ministérielles. Du moment qu'il a eu accepté, il est devenu commissaire codificateur à toutes fins quelconques ; et chaque jour qui a suivi et suit cette acceptation, il a continué et continue, selon les termes et dans l'esprit du statut, d'être codificateur. Peut-il, dans ces circonstances, cumuler les fonctions de juge et de codificateur ? C'est la seule question. Je dois, d'abord, faire remarquer en explication du statut de 1849, qui ne permet pas qu'un juge, dans le Bas-Canada, accepte aucune charge de profit, que le statut de la codification fait une exception. Mais, aussi, faut-il se renfermer dans cette exception, et ne pas lui donner, non plus qu'à toute autre exception à des principes de même nature, une portée qui ne saurait être justifiable. Les charges de juge *actif* et de celle de codificateur *actif* (qu'on me permette l'emploi de cette expression), sont incompatibles. Les deux charges ont dû paraître telles aux yeux du législateur. Lorsqu'il s'est agi de la Cour seigneuriale, la loi a permis d'essayer le sytème contraire. La chose n'a pu être accomplie. Le législateur avait devant lui ce résultat, lorsqu'il a passé l'acte de la codification. Il a donc dû vouloir y rémédier. Et c'est ce qu'il a fait, en se servant de termes impératifs pour la nomination d'un juge assistant à la place du juge de notre cour, qui serait fait codificateur ; il a voulu et a expressément dit, sans aucun terme modificatif, qu'il y aurait un juge suppléant, et que ce juge suppléant serait nommé " *pour et* " *durant le temps* que le juge nommé commissaire en vertu du " présent acte continuera à être tel commissaire" ; puis le statut ajoute : " Et tout juge suppléant ainsi nommé aura et exer- " cera, *durant le dit temps*, (quel temps, si ce n'est celui que " doit durer la commission, et qui commence à la nomination " et acceptation des codificateurs), *tous* les pouvoirs et autorités " et remplira *tous* les devoirs accordés ou assignés par la loi à " un juge de la cour dans laquelle il aura été nommé juge " suppléant dans telle cour." Cette phraséologie indique que, dans la pensée du législateur, il y avait, comme de fait, il doit nécessairement y avoir, incompatibilité des deux charges. Or, si cette incompatibilité existe, elle existe depuis le commencement, c'est-à-dire, depuis la nomination du commissaire par lettres patentes régulièrement émanées et non depuis un jour quelconque, fixé par des instructions quelconques, et non encore connues, mais toujours changeables à volonté. On a même dit que, si un juge suppléant était nommé, cela ne pourrait pas avoir l'effet d'empêcher M. le juge Caron de siéger dans cette cour. Je crois que c'est là montrer trop de

zèle. La loi dit que le juge suppléant exercera *tous* les pouvoirs et remplira *tous* les devoirs de M. le juge Caron ; cependant M. le juge Caron *exercerait tous ces pouvoirs* et *remplirait tous* ces devoirs en même temps, c'est-à-dire, qu'au lieu de cinq juges dont cette cour doit être composée, lorsqu'il plaira au gouverneur de nommer un cinquième juge en pied, nous en aurions six ! Voilà où nous conduit cette argumentation. Nous, nous voulions rester à quatre ; on fait une loi qui nous donne un cinquième juge ; et, par interprétation d'un certain statut, on nous donne un sixième juge. Et, cependant, ni l'un ni l'autre ne sont encore nommés ! Et déjà il y a cinq causes qui ne peuvent être jugées, parce que le présent quorum de cette cour est également partagé. Il me semble, et je parle ici comme juge, que les parties concernées dans ces cinq causes ont le droit d'exiger que leurs causes soient jugées. Il y a, pour ces parties, un déni de justice. Leurs causes sont devant nous, et je me fais, en passant, un devoir d'exposer leurs griefs. La 18e section du statut, quoique ne pouvant avoir aucune influence quelconque sur la présente question, a été erronément invoquée par M. Loranger. Le juge nommé commissaire, est payé comme commissaire, et non comme juge. Tout juge de la Cour du Banc de la Reine ou de la Cour Supérieure pour le Bas-Canada, qui pourra être nommé commissaire comme susdit, ne recevra, pendant qu'il agira comme tel, aucune rémunération comme commissaire, excepté l'excédant (s'il y en a) de la rémunération d'un commissaire *sur son salaire comme juge ;* c'est-à-dire, que le chiffre du salaire du juge est entré dans les calculs économiques de l'auteur de la loi ; et rien de plus. Au reste, cette 18e section, rend évidente l'intention de la législature qu'il y eût immédiatement un juge suppléant. Et c'est là la seule conclusion à laquelle on puisse, à mon avis, raisonnablement arriver. Je ne parle pas du cinquième juge, quoique sa nomination soit également impérative. Il suffit d'un *quorum*. et ce *quorum* est de quatre, pour que cette cour puisse siéger. Mais faut-il, du moins, que ce *quorum* soit composé de personnes qualifiées à prendre leur siège dans cette cour. Je pense que M. le juge Caron ne l'est pas, tant qu'il sera codificateur. Il ne cesse pas d'être juge ; mais l'exercice de ses fonctions judiciaires est suspendu. Ces fonctions doivent être remplies par un assistant qui tiendra sa place, " pour et durant tout le temps qu'il continuera d'être codificateur." Ce sont les termes du statut.

AYLWIN, J., concurred in opinion with the Chief Justice.

CARON, J. : Pour bien comprendre la question qui se présente ici, il est à propos de connaître les faits qui l'ont fait surgir. Il n'y a pas encore un mois qu'il a été émané sous l'autorité de l'acte de la 20e Vic., ch. 43, une commission nommant trois

personnes pour surveiller la codification des lois du Bas-Canada. Je suis un de ces commissaires, et je n'ai accepté qu'à la condition que je pourrais siéger, pour rendre jugement dans les causes qui ont été plaidées devant moi ; aussi, la commission était accompagnée d'instructions intimant aux commissaires qu'ils ne commenceraient leurs travaux qu'au mois d'avril prochain, et, en conséquence, mon devoir était de me mettre en état de rendre jugement dans toutes les causes qui ont été plaidées devant moi ; je me suis préparé à le faire et je suis venu à Montréal, prêt à rendre ces jugements, et même à entendre de nouvelles causes, vu qu'il n'avait pas encore été nommé de juge suppléant pour me remplacer, sauf à la cour à fixer un jour avant le 1er avril pour rendre les jugements, quand, en arrivant j'ai appris que deux de mes honorables confrères étaient d'opinion que ma nomination comme commissaire de la codification me rendait incompétent à siéger même dans les causes prises en délibéré ; j'avais droit d'être surpris d'une récusation faite d'une manière aussi extraordinaire, lorsqu'il n'y avait aucune réclamation de la part des intéressés, ni déclaration d'incompétence, de ma part. Je ne me cache pas l'importance d'une semblable décision, et je dois croire que mes honorables confrères ont bien pesé leur opinion et qu'ils n'ont aucun doute sur ce point, pour en venir à une détermination qui peut être aussi préjudiciable aux parties. Pour moi, c'était un devoir impérieux d'être ici pour remplir mes fonctions de juge, n'ayant jamais compris que je fusse disqualifié ; et j'étais confirmé dans cette opinion par l'assurance de personnes dont les lumières et l'expérience m'inspirent la plus grande confiance ; je dirai même plus, c'est que tous ceux avec qui j'ai eu occasion de parler de l'affaire ont pensé comme moi, et cette manière de voir est partagée par un des membres de cette cour. Cependant j'aurai à me retirer ; mais avant j'expliquerai les raisons que j'ai de différer d'avec les deux autres juges de cette cour. Si je suis incompétent, cette incompétence doit résulter ou de la loi, ou de l'incompatibilité des fonctions de juge et de codificateur. Sur ce dernier point il ne peut y avoir d'incompatibilité, du moins, dans les circonstances actuelles, le travail de la codification n'étant pas encore commencé. Si dès la réception de la commission, mes fonctions de codificateur avaient commencé il y aurait eu lieu à difficulté ; mais tel n'est point le cas. Le gouverneur, en même temps qu'il était autorisé par le statut, à nommer des juges comme codificateurs, a reçu le pouvoir de donner à ces commissaires les instructions qu'il jugerait convenables, et qui étaient obligatoires comme le statut lui-même. Dans les instructions qui accompagnent la commission, il est prescrit aux commissaires de ne commencer l'exercice de leurs fonctions qu'au premier avril pro-

chain. Cet ordre n'est pas donné au juge, mais au commissaire, et il n'y a, conséquemment, dans cet ordre, rien qui puisse attaquer l'indépendance du juge, ainsi qu'on l'a avancé : jusqu'au premier d'avril, je n'avais aucune fonction à remplir comme codificateur et, conséquemment rien qui fût incompatible avec celle de juge ; et non seulement je suis justifiable de les remplir, mais j'y suis tenu par un devoir impérieux. En lisant le statut, je dois lui donner l'interprétation la plus étendue et la plus équitable, et je tiens qu'ici l'intérêt public et celui des parties *litigantes* exigent que je m'acquitte de mes fonctions judiciaires jusqu'à ce que je puisse m'occuper des devoirs de codificateur. Ces observations, suivant moi, font disparaître tout doute sur la question d'incompatibilité des fonctions de juge et de codificateur, du moins quant à présent. S'il en est ainsi, reste à savoir si l'incompétence qu'on allègue résulte de la loi elle-même. Voyons le statut : les termes en sont positifs et démontrent qu'il n'y a pas cessation des fonctions de juge par l'acceptation de la commission de codificateur. Mais y a-t-il suspension ? Pour le soutenir il faudrait dans la loi quelque disposition dont on pût l'inférer. On prétend la trouver dans les termes dont le législateur se sert : *It shall be lawful*, il sera loisible au gouverneur de nommer un juge ou un avocat pour remplir la place du juge nommé codificateur, et l'on dit que ces termes sont impératifs. A l'appui de cette prétention, on a invoqué l'acte de 1849, ch. 37, qui porte qu'aucun juge ne siégera dans le conseil exécutif ou dans la chambre d'assemblée et ne pourra occuper aucune autre place lucrative sous la Couronne. Quel serait l'effet de cette loi : aucun autre que de rendre nulle l'acceptation de cette autre place lucrative, ou soumettre le juge à une mise en accusation soit pour avoir violé la loi, soit pour le faire condamner à quelqu'amende ou au remboursement des deniers qu'il aurait reçus à raison de ses nouvelles fonctions. Je suppose qu'un juge soit élu membre de l'Assemblée législative, et se présente pour y prendre siège, on lui dira qu'étant juge, son élection est nulle et on le renverra. En acceptant le mandat, il n'a pas perdu sa qualité de juge. Je suppose encore que le gouverneur nomme un des juges contrôleur ou inspecteur des douanes à Montréal, les autres juges auront-ils le droit de lui dire : " Vous n'êtes plus juge." De même, dans le cas actuel, peut-on dire que j'ai perdu ma commission de juge? Par l'acte 7 Vict., ch. 15, établissant l'indépendance des juges, lors même qu'il y aurait plainte contre moi, j'aurais droit d'exercer mes fonctions jusqu'à révocation en la manière portée par cet acte ; et cette cour n'est pas le tribunal qui puisse juger que j'ai forfait ma place de juge. Mais les actes de 1852 et de 1854 doivent-ils nous servir pour interpréter celui de 1857 ?

De ce que ces deux actes, dans des circonstances analogues, donnent au gouverneur le droit de nommer des juges assistants, *s'il le juge à propos*, s'ensuit-il que celui de 1857, qui ne contient pas ces termes, fasse un devoir au gouverneur de le nommer et sans délai ? La conclusion n'est pas de rigueur. D'ailleurs, en supposant que tel fût le cas, et que le gouverneur fût tenu de se conformer à cette prescription à peine de nullité, quelle serait celle de mes deux commissions qui en serait affectée ? Je dis que ce serait celle de codificateur et non celle de juge. J'en viens maintenant à l'acte seigneurial de 1854 qui, dans sa section 16, paragraphe 10, autorise le gouverneur à nommer des juges assistants. Cette clause est rédigée dans les mêmes termes que le statut de 1857, excepté que, dans le premier, il est dit que le gouverneur pourra remplacer les juges de l'une ou de l'autre cour. Sous l'opération de cet acte, les seuls juges de la Cour Supérieure ont été remplacés. En point de fait, cependant, cette assertion n'est pas correcte, car, si je suis bien informé, un juge suppléant fut nommé pour aller tenir la Cour criminelle à Sherbrooke, fut assermenté et était sur les lieux pour exercer ses fonctions ; et, nonobstant cela, un des juges de la Cour d'Appel, avec l'assentiment des autres, a quitté la Cour seigneuriale pour aller présider le terme criminel à Sherbrooke ; il y a rencontré M. Driscoll qui avait sa commission de juge assistant, et l'a renvoyé. La Cour d'Appel se trouvait ainsi dans ce moment-là composée de cinq juges, quoique le nombre fixé par la loi ne fût que de quatre. Maintenant que le nombre des juges de cette cour est fixé à cinq, et s'il en était nommé un sixième, comme *suppléant*, quoique l'objection fût alors plus grande, la question trouve une solution dans le précédent que je viens de citer. Examinons maintenant l'acte de la codification. La deuxième clause porte "*qu'il sera loisible* au gouverneur de "nommer tout juge de circuit ou tout avocat de dix années, "au moins de pratique.... pour être et agir comme juge sup-"pléant."..... Pour prétendre que la nomination d'un juge comme commissaire de la codification et celle de son suppléant doivent être simultanées, il eût fallu que la loi le requît d'une manière claire ; ne l'ayant pas fait, elle est censée avoir laissé au gouverneur la discrétion sur le temps et le mode de faire ces nominations. C'est à la législature et non pas à ce tribunal à déclarer s'il y a eu violation de la loi ; pour moi, loin de voir dans la conduite du gouverneur rien qui pût être considéré comme tel, je trouve au contraire qu'il a exercé la discrétion qui lui était laissée dans l'intérêt du pays et des plaideurs. Je trouve encore, dans les autres clauses de l'acte, des dispositions qui justifient cette manière d'envisager la question. La 18e section relative au paiement du salaire re-

connaît la double qualité et de juge et de codificateur. Sentant l'importance qu'il y a de décider les causes qui ont été prises en délibéré, j'ai déclaré que je n'accepterais point la commission, si par là j'étais dans l'impossibilité de remplir ce devoir. Les officiers en loi de la Couronne ont été d'opinion que la chose était praticable, et ils ont compris que je pouvais encore participer à rendre les jugements en question, et je suis prêt à le faire; mais, n'ayant pu rallier à mon opinion les autres juges, je suis obligé de me retirer; mais je ne puis le faire, sans protester que les résultats et les inconvénients qui pourront surgir de cette difficulté dont j'ai été l'occasion, mais non la cause, ne peuvent retomber sur moi.

DUVAL, J.: This court is called upon to decide whether MR. Justice Caron, by accepting the office of commissioner for codifying the laws of Lower Canada, in virtue of the 20 Vic., c. 43, is disqualified to sit in this court, and to perform the duties of a judge thereof. I am of opinion he is not, *at present*, disqualified. There can be no doubt that, as a general rule, a public officer may lose the office he holds by the acceptance of another incompatible with the one already held. The public interests require this. A strict and faithful performance of duties is a condition of the tenure of every public office. Whenever, therefore, a public officer accepts another office, the nature and extent of the duties of which do not admit of a full discharge of the duties of the first, or where the offices are subordinate to, or interfere with each other, then the public officer must be declared to have made his option, and the acceptance of the latter held to be, virtually, a resignation of the first. Let us apply this principle to the present case: Mr. Justice Caron has accepted a commission under the statute above-mentioned. This statute does not state when the commissioners shall commence to perform their duties, nor does it inform them at what place they are to meet. The commission, at this moment, is not fully organized: there still remains something to be done before the commissioners can act. We all know that one of the commissioners is now in Europe, and that no place of meeting has yet been appointed by the governor, as prescribed by the 19th clause. What duties then, compatible or incompatible with those of a judge, have the commissioners, at this day, to perform? Clearly none. We have received the further information that the commissioners are not to enter on the performance of their duties before the first of April next. Then, before this last-mentioned day, they are to receive no salary; the 17th clause is positive on this head. We have now arrived at the conclusion that, before the first of April next, the commissioners have no duties to perform, and therefore no pay to

receive. Such being the case, I cannot see the strength of the reasoning by which this alleged incompatibility is attempted to be established. I can well understand that, on public grounds, as above stated, a public officer shall not be allowed to hold two offices, and receive the emoluments of both, when he can perform the duties of but one. He cannot stipulate that he will be in two different places at one and the same time. The reason of the rule is a sound one, and, in applying it, the public interests ought to guide the judge, but I cannot understand in what respect we consult or further the public interests by declaring that a judge cannot sit in this court, and perform his duties, this day, because, months after this, he is to be called upon to perform the duties of another office. If the legislature had expressly enacted that the commissioners should not enter on the performance of their duties before the first of April next, would the principle as we find it *worded*, or would its *spirit* justify such a decision? To say so one must lay down the rule, that the mere acceptance of an office, requiring no duties to be performed, will vacate the first held. This rule is to be found nowhere; no sound, nor even plausible reason could be assigned in its support. The reasoning of the several writers who can be referred to on the subject, all point to the conclusion I have come to. It is the impossibility of faithfully performing the duties of the several offices that affords the true ground of decision. But it is said, the governor general had no right to send any letter of instructions. In this, it is impossible for me to concur; for the 8th clause in express terms authorizes such instructions *in all matters not expressly provided for by the statute.* The Seigniorial Act of 1854 has been referred to. In my opinion, it has no application whatever to the question now under consideration. In England, the crown has a right to ask the opinion of the judges, though of late this right has been very seldom exercised. The house of lords has the right and exercises it. The same right might and would have been exercised by the legislature of Canada, without the authority of any statute, had not the passing of such a statute been necessitated for other purposes therein enumerated. Its existence did not suspend the powers of the judges, nor did it affect them otherwise than in justifying their postponing the business before them, in their own courts. I am therefore of opinion, the honorable judge is not disqualified, any more than the clerk of this court, who has been named one of the secretaries to this commission, and who, by the 17th clause, is ordered to give his *whole time* to the duties of his office, but he now holds the two offices. In concluding, I will refer to the wording of the 18th clause which provides that the judge appointed commissioner while *acting* as such

shall receive no remuneration except the excess over his salary as judge, and this very significant word *acting* is repeated in this same clause when speaking of the appointment of the assistant judge to supply the place of the judge named commissioner. This conclusively answers the reference made to the second clause and explains the intention and meaning of the legislature. (5 *J.*, p. 79.)

PROCEDURE.—PLEAS.—EVIDENCE.

COURT OF QUEEN'S BENCH, Montreal, 1st December, 1860.

Coram Sir L. H. LAFONTAINE, Bart., C.-J. AYLWIN, J., DUVAL, J., MEREDITH J., MONDELET, (C.), A.-J.

CHAMBERLIN (Plaintiff in the court below), Appellant, *and* BALL (Defendant in the court below), Respondent.

Held: 1. That a protest to a promissory note, although it appears to be insufficient upon the face of it, must nevertheless be held to have been regularly and legally made, unless, with the plea attacking it there is produced an affidavit pursuant to 20th V., c. 44, s. 87, that such protest was not regularly made. (1)

2. That parol evidence is inadmissible to prove that an indorser of a promissory note indorsed in blank, agreed, at the time such indorsement was made, to take such note solely upon the credit of the maker, without recourse to the indorser.

This was an action in the Superior Court, at Sherbrooke, by the indorsee Chamberlin, against the indorser Ball, for the amount of a promissory note indorsed in blank, before maturity, upon failure of the maker to pay after protest. The maker, John Turner, at the maturity of the note, had left the country, but is described in the declaration as " of the town of Sherbrooke." The terms of the protest, as proof of demand upon the maker, were the following, as certified by the notary, " did exhibit the original promissory note, whereof a true copy is above written, unto a grown person, at the hotel, in Sherbrooke, called " the Sherbrooke house " kept by the said Wright Chamberlin, being the usual place of abode and business of the said John Turner, the promissor thereof, when in Sherbrooke." It was pleaded, by Defendant, in the court below, that this demand and protest was insufficient, under section 13 of 12 V., c. 22, to bind the indorser. It was contended that this was not evidence of a presentment at the residence or place of business of the maker. The language of the protest was consistent with Turner's either having or not having a permanent residence or place of business in Sherbrooke, but

(1) V. art. 145 C. P. C.

did not assert either. It was equivocal and, consequently, of no validity, as certifying a fact, and it did not appear that the demand was made of any person having any connection with Turner, or even of a person connected with the hotel where he was said to reside. It was further pleaded by Defendant that, at the time said note was transferred, there was a parol agreement between Chamberlin and Ball, that Chamberlin should take the note solely on the credit of Turner, without recourse to Ball. After proof was made, the following judgment was rendered by the Honorable Edward Short, judge, holding the Superior Court, at Sherbrooke, in the district of Saint Francis, on the 18th June, 1859 : " The court, considering " the evidence adduced herein by Defendant is legal, and he " hath maintained the allegations of the exceptions by him " pleaded, that the promissory note sued upon was transferred " by Defendant to Plaintiff, on the express agreement of " Plaintiff's looking for payment solely to John Turner, " the maker, and no legal presentment for payment of " said note was made, at the maturity thereof, and no " notice of non-payment was given to Defendant, and the " endorser thereon is fully discharged from all liability " therein, doth overrule Plaintiff's motion to reject the " evidence adduced by Defendant, and doth dismiss the " action of Plaintiff." Against this judgment, Chamberlin appealed, and the following propositions were submitted to the Court in Appeal, by Appellant : 1. That the promissory note was duly presented for payment, and the protest and notice, are regular and sufficient ; 2. That, even if there be an irregularity in such presentment, protest and notice, it was waived by Respondent, who neglected to avail himself of the only legal method of objecting to the sufficiency of such protest and notice : 3. That, in the absence of an allegation of fraud, parol evidence is inadmissible in support of a contemporaneous verbal agreement to contradict a valid written instrument and, and consequently 4. That the evidence adduced by Respondent in support of his plea was illegal and ought to have been rejected. These propositions were supported by reference to the following authorities : AS TO SUFFICIENCY OF PRESENTMENT, Story, *Prom. Notes*, § 235. AS TO THE REGULARITY OF THE PROTEST AND NOTICE : The Act 20 Vic., cap. 44, sec. 87, enacts as follows : " If, in any action on a " bill of exchange or promissory note * * the Defendant " shall deny the genuineness of such instrument, or that the " *protest, notice and service thereof* (if any be alleged by the " Plaintiff), *were regularly made*, * * such instrument and " signatures shall nevertheless be presumed to be genuine, and " such *protest, notice and service* TO HAVE BEEN REGULARLY

" MADE, unless, with such plea, there be fyled an affidavit * * " that such protest, notice and service were not regularly " made, and in what the alleged irregularity consists." Respondent neglected to fyle any such affidavit, and waived his right to urge any objections to the sufficiency of the protest and notice, and Appellant is entitled to the benefit of the statute cited. As to the inadmissibility of parol evidence: " Parol evidence is inadmissible to contradict or vary the " terms of a valid written instrument. 1 Grenleaf, *Ev.* § 275, 276, 277 ; 1 Phil. and Am., *on Ev.*, p. 756 ; 2 Phil., *Ev.*, 357 ; 2 Starkie, *Ev.*, p. 757 (Am. Edition.) ; 1 Meeson and Wells. 379, 380, case of *Adams* vs. *Woodley ;* 2 do do 440 ; 5 do do 363, 367 ; 8 do do 844, 845 ; Story, *on Contracts*, 669, 671 ; 2 Saund., *Pleading and Ev.*, 498-502 ; 6 Adol. and Ell., 486 : Addison, *on Contracts* 159 ; 1 Halsted's, *Digest Law of Evidence*, p. 230 and *seq.*, nos 8, 16, 23, 24, 28, 29, 43, 44, 45, 53, 70, 77, 91, 92, 95, 97, 126. 130, and cases cited ; also p. 412, nos 12 and 30 ; Chitty, *on Bills*, p. 5 ; 12 Wend. 573, case of *Bowman* vs. *Johnston ;* 8 Bing. 244. 31 *Eng. L. and E. Reports*, p. 164. Pothier, *Oblig.* nos 2, 793, 796 and 797 ; 2 Domat, liv. 3, tit. 6, sec. 2, nos 4 and 7 ; *As to the endorsement in blank.* The second section of the Act 12 Vic., cap. 22, provides that a " *holder, under a blank endorsement, shall have the same remedy by action, as if the endorsement were in full.*" Story, *Prom. Notes*, § 135, 138 ; Smith's *Mer. Law*, p. 278, (Am. Edition, 1850) ; 2 Meeson and Wels 317, case of *Allen* vs. *Walker.* When the *legal construction* of an instrument is well settled, it is inadmissible to vary such instrument by parol evidence. 5 Phillips *Evid.* (Notes to vol. 2.), p. 597, and cases cited. Defendant states in his plea, that he " simply put " his name upon said note to convey the same to Plaintiff." Such endorsement was entirely unnecessary. The second section of 12 Vic., cap. 22, provides " that any bill drawn, or " note made payable to the order of any person * * shall be " transferable by endorsement either in full or in blank *or by* " *delivery.*" Respondent controverted the legal propositions sustained by Appellant, and urged that 20th Vict., c. 44, sec. 87 never intended to accomplish more than to render a promissory note or protest *prima facie* proof of the contract or *acte.* It did not intend to make them more than they appeared to be upon the face of them. To understand more than this from the act is to make a contract by operation of law not contemplated by the parties and to render certain actes evidence of facts which never transpired. This is exceeding the boasted omnipotence of Parliament. To make an object appear to the senses of sight, touch or sound in a different manner from what it does by the laws of nature is not only

beyond the province, but beyond the power of legislation. The laws of gravity cannot be altered by acts of Parliament. When a notary certifies that he did certain things in a certain way, the law can so far render that a good certificate as to render his signature authentic, and render unnecessary certain technical forms or even supply omissions; that is presume some things done which are not stated and are not inconsistent with what is stated, but it cannot, assume that he did something quite different from what he certifies to, and in a different way from that stated by him without doing violence to the laws of nature and mind. It was contended that no document by the assistance of this act could be interpreted to be else than what it actually shewed itself to be, and that no court could be required to shut its eyes and abandon the exercise of reason in the estimation of evidence; that the protest shewed upon the face of it that the notary could not comply with the requirements of the law and that demand which the law requires to be made upon the matter to bind the indorser, was not made, and to hold that done which *evidently* was not done, is revolting to every idea of the administration of justice. Such never could have been the meaning of the law, and if intended, it exceeds the power of legislation to give it such significance. Blackstone says of the English Parliament: "It can do every thing *not naturally impossible.*" plainly intimating that it cannot do what is naturally impossible. On the remaining legal question as to the admissibility of parol evidence to prove an agreement by indorser with indorser to take the note on the credit of the matter, Respondent referred to the following authorities: "Although, in general, a parol agreement is not admissible to control the operation of a bill or note, yet it has been ruled that, where the indorser of a bill takes it under an agreement not to sue the indorser, he cannot sue such indorser, although the indorsement be unqualified. Roscoe, on Bills, p. 138. If there be a verbal agreement, between the first indorser and his immediate indorsee, that the indorsee shall not sue the indorser, but the acceptor only, it has been held that such an agreement would be a good defence on the part of the original indorser against his immediate indorsee suing in breach of the agreement," Byles, on Bills, Eng. Edition, p. 86. An indorsee of a bill or note, taking it under an agreement not to sue the indorser, cannot sue such indorser, though the indorsement be unqualified," *Pike* vs. *Street*, M. & M., 226 Tenterden; See *Harrison's Digest*, vol. 1, p. 520, *Bills of Exchange* and *Prom. Notes.* "Parol evidence is admissible, in an action by the indorsee against the indorser of a note indorsed in blank, to show that, at the time of the indorsement, the indorsee recei-

ved the note under an agreement that he should not have recourse to the indorser." *Hill* vs. *Ely*, *Serg.* and *Rawle*, 363. S. P. *Field* vs. *Nickerson*, 13 Mass. Reports, 138. *Cummings* vs. *Fisher*, Anthon's N. P. 4. "So, in an action by the assignee against the assignor of a sealed note, to recover back the consideration paid on the assignment, parol evidence was held admissible on the part of Defendant to prove that, at the time of assigning the note, the Plaintiff agreed to put it immediately in suit and to take it at his own risk." *Mehelm* vs. *Barnet*, 1 Coxe, 86; *Storer* vs. *Logan*, 9 Mass. Rep. 55; Am. Ed. of Starkie, on Evidence, vol. 2, p. 792, note. "So it may be shown, by parol testimony, that an assignment of a mortgage absolute in its term is a mere security for the performance of a contract." Gilchrist vs. Cunningham, 8 Wend., 641; Am. Ed. Starkie, on Ev., vol. 2. p. 757, note. "There is an intermediate class of cases partaking of the nature of both patent and latent ambiguities, where the words are all sensible and have a settled meaning, but, at the same time, consistently, admit of two interpretations according to the subject matter in the contemplation of the parties. In such case, parol evidence is admissible to show the circumstances, under which the contract is made, and the subject matter, to which the contract referred." *Piesch* vs. *Dickson*, 1 Mason's C. C. R., 9. Idem p. 754, note. "Parol evidence is admissible to prove an agreement between the parties that a bill of exchange which had been given by one of them to the other should not be negotiated." *Robertson* vs. *Nott*, Condensed La. Rep., vol. 2, p. 614. "Parol evidence may be received that a person not named as payee in a bill of exchange, furnished the value, and is interested therein. Idem, vol. 1, p. 179 *Greve's Syndics* vs. *Sagory*. Where an executory agreement, not within the Statute of Frauds, expresses no consideration, you may show what the consideration actually was. Upon a like principle, a blank indorsement of a note or bill of exchange does not, as between the immediate parties, preclude evidence of contemporaneous parol stipulations, showing that a restricted operation was intended to be given by the signature, or that the transfer was upon trust and not absolute, for, in these cases, the written engagement was left incomplete by the parties." This is sustained by a host of authorities. See Cowen's Notes, to Phillip's Evidence, Am. Ed. of 1850, p. 600.

MONDELET (C.), A. J.: This is an action by an indorsee against the indorser of a promissory note, It is defended upon two grounds: 1, That the protest was not legal and sufficient to bind the indorser, and 2. that, at the time of the making the indorsement, which is unqualified, there was a verbal agreement between Appellant and Respondent that Appellant

should take the note solely on the credit of the maker. The first point is set at rest by the Statute 20 Vic., ch. 44, sec. 87, which provides that protests shall be held to have been regularly made, unless, with plea impugning them, there be an affidavit to the contrary. There is none in this case and the protest must be held regularly made. The second ground of defence I consider cannot be established by parol testimony. It is permitting the contradiction of an explicit written contract by oral evidence which is contrary to law.

MEREDITH, J.: The action in the court below was for the recovery of the amount of a promissory note for $214.17, made by John Turner, and endorsed by an endorsement in blank, by Defendant to Plaintiff. Defendant resisted Plaintiff's demand on two grounds: 1st Because Plaintiff, at the time the note was endorsed over to him, expressly agreed to look to the maker exclusively for payment; 2nd Because the note was not legally protested. It is true that the protest upon the face of it appears to be defective. It purports to have been made, not at the usual residence or place of business of the maker of the note as the law requires (12 Vict., c. 22, sec 13); but at "The Sherbrooke House," "being the usual place of abode and business of John Turner, the promiser thereof, *when in Sherbrooke.*" Defendant availed himself of the insufficiency of this protest by an exception, but did not file an affidavit with his exception, as required by the 20 Vict., cap. 44, sec. 87, and, therefore, it is said, has lost any advantage he might otherwise have derived from the alleged insufficiency of the protest. On the part of Defendant it is contended that the effect of the statute is merely to cause a protest to be presumed to be what it purports to be on its face. This interpretation would deprive the statute of any effect; because, even before the passing of the law, a protest was presumed to be what it purported to be on its face. Moreover, according to this interpretation, if a protest fyled appeared to be informal, the court, even without an affidavit, would be bound to presume it to be insufficient and irregularly made, although the law expressly declares that, unless an affidavit be fyled, the court shall presume *the protest, notice and service to have been regularly made.* It must be admitted that it does not appear reasonable that the court should, under ordinary circumstances, be required to presume without proof, that a protest is sufficient, although upon its face it would seem to be irregular. At the same time, it may be observed that, if Defendant had filed an affidavit with his exception, as required by the statute, Plaintiff might have answered that the presentment was made at "Sherbrooke House," in pursuance of an express agreement between the parties, or might have

met the exception by some other answer of that kind. Upon the whole, it appears to me, that as an affidavit was not fyled, with the exception, impugning the protest, we must under the statutory provision relied on by Plaintiff hold the *protest, notice and service* to have been *regularly made.* As to the other point made by Respondent (Defendant in the court below), I am of opinion that the parol evidence (if admissible) is sufficient to establish the alleged agreement, between Plaintiff and Defendant; it is therefore necessary to determine upon the admissibility of parol evidence to establish the agreement in question. There is no rule of evidence of greater importance or better established than the rule that "parol evi-" dence is inadmissible to contradict or vary the terms of a " valid written instrument," and that this rule has been strictly enforced in England, as to bills of exchange and promissory notes as being necessary for the maintenance of the credit of commercial paper may be seen by the nnmerous cases collected in Harrison's *Digest,* under the head " Bills of Exchange." " Evidence to vary terms," vol. 1, p. 1348, edition of 1844. On this subject, reference may also be made to Ross's leading cases, vol. 1, p. 166 and seq., Parol evidence. Addison, *on Contracts,* p. 158 ; Greenleaf, S. 281 ; Holcombe's leading cases, p. 356. Respondent has cited a number of authorities, as establishing his right to prove by parol evidence the agreement upon which he relies ; but among the authorities there is only one English case, namely, *Pike* vs. *Street,* 1 M. and M., p. 226. In this case, it is true that a verbal agreement restricting a general endorsement was proved by parol evidence ; and, as this case is referred to in all the treatise on bills of exchange, and may at first sight be regarded as an authority in favour of Defendant, I give the report (which is not long) as it is to be found in Moody and Malkin, p. 226, it is as follows: " This was an action by an endorser against the drawer and " endorser of a bill of exchange. The defence was that, though " Plaintiff had given full value to Street, the Defendant, for " the bill, yet it was under an agreement that he should sue " Mills the acceptor of the bill only, and should not sue the " Defendant as endorser. The agent of the Defendant who " negotiated the bill with the Plaintiff, said that the Plaintiff " took it under a verbal agreement to that effect. It was con-" tended for the Plaintiff that *such an agreement was invalid* " and contrary to the nature of a transfer by endorsement, " which was general and unqualified. Lord Tenterden in " summing up left it to the jury to say whether or no the " Plaintiff took the bill on the terms and conditions that he " should have recourse to Mills and him only, and not sue " Street at all ; if so, they should find for the Defendant, such

" an agreement, being a good bar to the action ; if they did " not believe that, then their verdict should be for the " Plaintiff." The counsel for Plaintiff in the case just cited made an objection which he ought not to have made, and omitted to make an objection which he ought to have made. He objected to the validity of the agreement when proved, but failed to object to the admissibility of the evidence. The result was that Lord Tenterden decided merely that the agreement if proved " was a good bar to the action," but he was not called upon to render, and did not render any judgment upon the question as to the admissibility of the evidence. This case is referred to by Chitty and Hulmes, in their treatise on bills of exchange, in the following terms : " And it has been de- " cided that if the endorsee of a bill verbally agree at the time " of his discounting the same, not to sue the drawer in the " event of non-payment by the acceptor, he is bound by that " agreement and cannot afterwards sue such drawer." Chitty and Hulmes, ed.of 1840, p. 144. And the same authors,in a subsequent part of their work (same work, p. 239) refer, to the same case in the following terms : " So if the endorsee of a " note, take it subject to an agreement not to sue the endorser, he is precluded from so doing." The reference to the same case, in the work of Mr. Byles (now Judge Byles), is as follows (p. 94 of edition of 1839): " If there be a verbal agreement between the first endorser and his immediate endorsee, that the endorsee shall not sue the endorser, " but the acceptor only, it has been held that such an agree- " ment would be a good defence on the part of the original " endorser, against his immediate endorsee suing in breach of " the agreement." The above quotations show that *Pike* vs. *Street* is regarded by the most esteemed writers, as deciding upon the effect of a particular agreement when proved, and not as determining by what kind of evidence such an agreement may be proved. It is true that, in the United States, the courts have held, in several cases, that the effect of a blank endorsement may be restricted by parol evidence ; and, as etablishing this point, the learned counsel for Respondent has referred, among other authorities, to the following passage from Cowen's Notes to Phillips, *on evidence*, vol. 4, p. 600. " Where an executory agreement not within the " statute of frauds, expresses no consideration, you may show " what the consideration actually was; upon a like principle " a blank endorsement of a note or bill of exchange, does not " as between the immediate parties preclude evidence of con- " temporaneous parol stipulation, showing that a restricted " operation was intended to be given by the signature, or that " the transfer was upon trust and not absolute ; for in these

" cases the writen engagement was left incomplete by the " parties." A very considerable number of American cases are cited by Cowen in support of this position. It is to be observed that the ground given, as that upon which the American decisions above alluded to rest is " that in these cases the written engagement was left incomplete by the parties." This ground, however, cannot be urged under our law, as by the second section of the 12 Vict., cap. 22, it is provided that " à holder under a blank endorsement, shall have the " same remedy by action, as if the endorsement were in full."

It is also to be observed that, although the weight of authority in the United States is clearly in favour of admitting parol evidence to control an endorsement in blank, yet that, in several cases, a contrary doctrine has been held. Mr. Cowen, at the end of the passage already cited, refers to three cases, as being against the admitting of such evidence ; and to these may be added the case of *Crocker* vs. *Getchell*, 10 Shep., 392, (U. S. Digest) sub. 2, p. 660, n° 1359, in which the court held " that parol evidence cannot be received to vary the legal " effect of an endorsement in blank upon a bill or note." These latter decisions seem to me to be in accordance with principle, because " parol evidence is no more admissible to contradict " what is implied from a written contract, then to contradict " its express conditions." (1) I therefore very much doubt whether even, in the United States, a distinction as to the point under consideration ought to have been made between an endorsement in blank and an endorsement in full, but, be this as it may, it is plain that, under the provisions of our statute already cited (the 12 Vict., ch. 22, sect. 2), there is no room for such a distinction. Viewing then, as I do, the english case of *Pike* vs. *Street*, as deciding merely that the endorsement of a note or bill, although general upon its face, may, as between the parties, be restricted by a verbal agreement, and not as deciding that such verbal agreement may be proved by parol evidence ; and having, as I think, shown that the american cases above referred to, (even if in other respects unobjectionable) cannot, under our provincial statutes, be considered applicable to the present case, I cannot avoid the conclusion that this case comes within the general rule that contemporaneous parol evidence is inadmissible to contradict, vary or control in any way a written instrument." I therefore am of opinion that the judgment of the court below admitting the parol evidence, is wrong ; that that evidence ought to be rejected ; and that a judgment should be rendered in favour of the Plaintiff, for the amount of the note sued upon.

(1) *Com. Bank of Lake Erie* vs. *Norton*, 1 Hill 501, Digest N. Y. Rep., vol. 1, p. 319 ; *Norton* vs. *Coon*, 2 Selden, N. Y., 38, Halstead, 1 vol., p. 242, n° 130.

AYLWIN, J. : Defendant has attempted to question the validity of the protest. It is clear that no sufficient presentment is certified by the notary, for there is nothing to connect the " grown person " mentioned by him with Defendant. But, our recent statute has required an affidavit, and it must be carried out rigidly; without the affidavit all objections are unavailing, and every defect cured. I regret that the legislature should have introduced affidavits again. The ancient *juramentum calumniæ* was so habitually evaded that it was abandoned in France. Custom-house oaths have in our own day been found useless in practice, and frivolous oppositions in our courts are not restrained by the necessity of an affidavit. The will of the legislature is however cheerfully to be obeyed without question. As to the admissibility of parol evidence, to prove the agreement respecting the note, set up in the defence, it seems to me that the case of *Pike* vs. *Street* has been extended far beyond what Lord Tenterden intended, all that he said was that such an agreement would be a sufficient defence to the action, but there was nothing said as to how it was to be proved. A note or letter or other writing would be good proof, perhaps the cross-examination of the Plaintiff's witness if an agent in the concoction of the note was in the contemplation of Lord Tenterden, but I see nothing in the english books to sustain the position taken on the part of the Defendant and in the absence of due authority I am not satisfied to adopt the american decisions on this point.

LAFONTAINE, C. J. : I concur in this decision that this judgment be reversed.

The court " Considering that Appellant hath proved the " material allegations contained in his declaration, and, con- " sidering that, although the protest is irregular, and although " Respondent hath sought to avail himself of the said irre- " gularity of said protest, by the pleading to the merits, yet " that Respondent cannot derive any advantage from said " irregularity, inasmuch as he has failed to file with his pleading " an affidavit, as required by the 87th section of the statute " 20th Victoria, cap. 44; and considering that Respondent " could not legally adduce parol evidence to prove that, at the " time, he endorsed the promissory note, it was verbally agreed, " as alleged by Respondent, that Respondent should incur no " liability upon the note, by reason of his endorsing the same, " inasmuch as the tendency of such parol evidence is to vary " and defeat a contemporaneous written contract, and there- " fore, that in the judgment of the court below, which is founded " as well upon the said irregularity of the said protest, as upon " the said parol evidence, there is error, the court doth in con-

" sequence reverse the said judgment, &c." (5 *J.*, p. 88 et 11 *D. T. B. C.*, p. 50.)

RITCHIE and BORLASE, for Appellant.

SANBORN and BROOKS, for Respondent.

SOCIETE.—ACTION PRO SOCIO.

COUR DE CIRCUIT, Montréal, 18 février 1861.

Coram BADGLEY, J.

LEDUC *vs.* TURCOT *et al.*, et LEGENDRE *et vir*, Opposants, et TURCOT *et vir*, Intervenants.

Jugé : Que, sur un jugement rendu solidairement contre deux associés, pour une dette personnelle à l'un d'eux, le paiement fait par le débiteur personnel, libère son coassocié, et que celui qui a payé ne peut alors se faire subroger aux droits du Demandeur, mais doit, s'il a des réclamations contre son associé, procéder directement par une action *pro socio.*

Le 13 février 1860, le Demandeur obtenait jugement contre les Défenderesses Louise Turcot Lafontaine et Caroline Legendre Cinq-Mars, conjointement et solidairement, pour la somme de $56.20, balance due sur billet. Après jugement, une des Défenderesses, Louise Turcot Lafontaine, paie le Demandeur, se fait subroger à tous ses droits et fait émaner un bref d'exécution contre sa codébitrice Caroline Legendre Cinq-Mars. Caroline Legendre Cinq-Mars s'oppose à la vente de ses effets saisis au nom du Demandeur, disant que le Demandeur a été payé du montant de la dette et frais en cette cause, et demandant en conséquence mainlevée de cette saisie. Cette opposition étant rapportée en cour, Louise Turcot Lafontaine intervient, disant qu'elle a elle-même payé la dette et frais au Demandeur, qu'elle est maintenant aux droits du Demandeur qui lui a été cédé son jugement, que la saisie faite chez l'Opposante est en exécution du transport, et demandant pour ces raisons, permission de contester l'opposition de dame Cinq-Mars. La contestation de dame Lafontaine alléguait les faits ci-dessus, la subrogation de l'Intervenante aux droits du Demandeur, et, de plus, que l'Opposante n'ayant jamais rien payé à compte du jugement, était sans intérêt à faire son opposition, et qu'elle ne pouvait se prévaloir, à l'encontre de l'Intervenante, du paiement fait par cette dernière au Demandeur, et concluait au débouté de l'opposition. L'Opposante répondit spécialement : que la dette pour laquelle avait été rendu le jugement transporté par le Demandeur à l'Intervenante était une dette personnelle à l'Intervenante, savoir, pour pain vendu à l'Intervenante par le Demandeur ; que l'Intervenante étant endettée au Demandeur, en une somme de

$56.20, montant du jugement, l'Opposante consentit à se porter caution de l'Intervenante, vis-à-vis du Demandeur, pour cette somme, et que l'Opposante et l'Intervenante donnèrent, en conséquence, au Demandeur leur billet, signé de leur nom social," Lafontaine & Cinq-Mars," pour la somme de $100.25, le Demandeur devant faire escompter ce billet et le rencontrer à son échéance, Louise Turcot Lafontaine lui payant les $56.20, qu'elle lui devait à cette époque ; que Caroline Legendre Cinq-Mars n'avait jamais eu intention de s'engager autrement que comme caution de madame Lafontaine et en faveur du Demandeur seul ; que, par leur acte d'association, les associées étaient, chacune tenue personnellement, de leurs dettes particulières, et que leur société ne pouvait être responsable de ces sortes de dettes ; qu'il est bien vrai que l'Intervenante a payé au Demandeur le montant du jugement en cette cause, mais que, par ce paiement, elle n'a fait que se libérer d'une dette qui lui était personnelle, et que le Demandeur n'ayant plus d'intérêt dans la cause, l'Opposante, qui n'était obligée que vis-à-vis de lui, se trouve déchargée par le paiement fait par l'Intervenante qui lui profite. La cause étant inscrite pour la preuve, l'Opposante prouva, par le Demandeur, que le billet sur lequel avait été obtenu le jugement avait été donné pour pain vendu à l'Intervenante. Cinq-Mars, une des parties, interrogée par l'Intervenante, avoua que Lafontaine avait mis environ £170 de plus qu'elle dans le fonds social, et que la société devait payer à Lafontaine l'intérêt légal sur le plus de sa mise.

Daoust, pour l'Intervenante, prétendit que Lafontaine avait une réclamation contre Cinq-Mars, pour ces intérêts et pour autres créances contre elle, non réglées par leur acte de dissolution de société, et avait droit de réclamer de Cinq-Mars le paiement de cette somme qu'elle avait payée seule. Que la subrogation que le Demandeur lui avait faite, de tous ses droits, en vertu du jugement rendu contre elles, solidairement, lui donnait droit d'exiger de Cinq-Mars au nom du Demandeur, et, comme ce dernier aurait pu le faire, le total de la dette et frais, et que Cinq-Mars ne pouvait se prévaloir du paiement fait par Lafontaine.

Jetté, pour l'Opposante, disait, au contraire, que toutes les réclamations de Lafontaine contre Cinq-Mars avaient été réglées par leur acte de dissolution de société, mais qu'en supposant qu'elle aurait quelque réclamation contre elle, elle n'avait pour la faire valoir que l'action *pro socio* contre Cinq-Mars, et qu'on ne pouvait, dans une instance comme celle-ci, discuter et décider toutes les affaires d'une société dissoute ; que Cinq-Mars, en consentant au billet donné au Demandeur, ne s'était obligé qu'en faveur de ce dernier,

et que, du moment que le Demandeur était payé, la dette reprenait son caractère primitif, et que celui-là seul qui en avait profité en était alors tenu ; (1) que Lafontaine ayant payé sa propre dette au Demandeur, ne pouvait aujourd'hui prétendre s'en faire rembourser par Cinq-Mars ; qu'enfin en supposant que Cinq-Mars serait tenu de payer, ce ne pourrait être que la moitié et non le total.

BADGLEY, J. : Après avoir relaté les faits : L'acte de dissolution et de composition des associés Lafontaine & Cinq-Mars, constate que Cinq-Mars a payé £50 à Lafontaine, en règlement de toutes ses réclamations, et était, en outre, chargé de payer tous les créanciers ; mais, en supposant que cela ne serait pas établi, l'Opposante ayant prouvé que la dette payée par Lafontaine, au Demandeur, était sa dette personnelle, elle ne peut en exiger le paiement de l'Opposante, et ne pourrait, dans tous les cas, le faire dans la présente instance. Intervention renvoyée et opposition maintenue. (5 *J.*, p. 96.)

FABRE, LESAGE et JETTÉ, pour l'Opposante.

DOUTRE et DAOUST, pour l'Intervenante.

ALIMENTS.—SOLIDARITE.

COUR DE CIRCUIT, Montréal, 31 décembre 1860.

Coram MONK, J. A.

LAUZON *vs.* CONNAISSANT *et vir.*

Jugé : 1° Que les enfants qui sont tenus par la loi de fournir des aliments à leurs parents doivent y être condamnés solidairement.

2° Que les parents peuvent s'adresser à celui des enfants qu'ils jugent à propos pour lui demander des aliments (2)

La Demanderesse poursuivit le Défendeur et sa femme, fille de la Demanderesse, et, par sa déclaration, alléguait : qu'elle est âgée de soixante et onze ans, infirme et incapable de gagner sa vie, et est exposée aux plus grandes privations par suite de son incapacité à pouvoir travailler ; que le Défendeur est son gendre, et, comme tel, il est tenu de lui payer une pension alimentaire, de £30 par année. Le Défendeur prétendait qu'il avait toujours payé la pension demandée ; que la Demanderesse a un autre gendre capable de contribuer à la supporter et qui devait être tenu et condamné à le faire pour moitié avec lui à raison de $6 par mois.

LAFRENAYE, pour la Demanderesse, cita les autorités sui-

(1) Pothier, *Obligations*, p. 108, n° 264, et p. 124, n° 282 ; Toullier, tome 6, n° 734.

(2) V. art. 169 C. C.

vantes, pour établir la solidarité reconnue en loi entre les enfants dans un tel cas: Rép. de Guyot, v° *Aliments*, p. 319, 2e col., 1er et 2e al.; n° 1678, *Gobeille* vs. *Gobeille*, jugement rendu à Montréal en 1853, C. S.

BETOURNAY, pour le Défendeur et sa femme, prétendit que la solidarité n'existait pas, et que les Défendeurs ne devaient être condamnés que pour leur part, et il cita: 1 vol. Anc. Den., vo *Aliments*, n° 6; 1 vol. *Dict. du Notariat*, p. 399, n° 30; Duranton, 2 vol. n°s 424 et 425. Le jugement de la cour reconnait l'existence de cette solidarité entre les enfants, et, en conséquence, condamne les Défendeurs à payer la totalité de la pension qui a été fixée à $8 par mois. (5 *J.*, p. 99.)

LAFRENAYE et PAPIN, Avocats de la Demanderesse

BETOURNAY et RICARD, Avocats des Défendeurs.

USUFRUCTUARY.—REPAIRS.

SUPERIOR COURT, Montreal, 28th June 1854.

Coram DAY, J., SMITH, J., MONDELET, J.

MCGINNIS *vs.* CHOQUET.

Held: That the proprietor of land enjoyed by another in usufruct, has not, by law, any right of action against such usufructuary, to compel him to make specific reparations, and do works on such land, or, in default thereof, to recover damages against such usufructuary, during the subsistence of such usufruct. (1)

By his declaration, Plaintiff, after setting out the deeds constituting the usufruct in favour of Defendant and the naked ownership in himself, and the violation of his rights of which Defendant had been guilty, prayed that she might be adjudged and condemned as *usufruitière* of the property within 30 days from the service on Defendant of the judgment to be rendered, to repair and place in the same good order and condition in which they were at the time Defendant entered into the possession, occupation and enjoyment, as *usufruitière* of the property, the house, farm and buildings in and upon the property, and, in all particulars and respects, to farm and preserve the same *en bon père de famille*, as in and by said act or *bail à vie* she became and is and was bound to do; and failing all which, that she, Defendant, as such last survivor in possession as *usufruitière* of the said *terrains*, be condemned to pay to Plaintiff the sum of £150, as and for damages, in *lieu* thereof." Defendant met this action by a *défense en droit* based on the following grounds: "1° parce que la demande

(1) V. art. 468 C. C.

est inutile et ne tend qu'à faire constater un droit reconnu et incontestable ; 2° parce que le Demandeur étant, d'après ses allégués, le nu propriétaire de l'immeuble dont la Défenderesse a la jouissance et l'usufruit, il ne peut intenter contre elle aucune action comme celle contenue en sa déclaration en cette cause ; 3° parce que le Demandeur, d'après la nature de ses droits exposés dans sa déclaration, n'a et ne peut avoir d'autre action que celle en déchéance d'usufruit, la seule que la loi lui accorde, et que l'action du Demandeur n'est pas une action en déchéance d'usufruit."

DAY, J. : In giving judgment, said that there was no such action as Plaintiff's. The proper remedy was by an action to have the usufruit declared *déchu*, forfeited, or to have the estate sequestrated, and the proprietor allowed to use the property and pay the value of the use to the usufructuary. He referred to the articles of the *Répertoire de* Guyot, headed *Abus de jouissance*, and *Dégradation*.

" The court, considering that the proprietor of land and premises held by another in usufruct hath not, by law, any right of action against such usufructuary, to compel him to make specific reparation, and do any works on such land and premises, or in default thereof, to recover damages against such usufructuary, during the subsistence of the usufruct, maintaining the *défense en droit*, doth dismiss Plaintiff's action." (5 *J.*, p. 99)

BLEAKLEY and ANDREWS, for Plaintiff.

LABERGE and LAFLAMME, for Defendant.

OPPOSITION A JUGEMENT.

COUR DE CIRCUIT, Montréal, 18 février 1861.

Coram BADGLEY, J.

GAUTHIER *vs.* MARCHAND.

Jugé : 1° Que, dans le cas d'opposition à jugement obtenu en vacance, l'Opposant n'est tenu de déposer entre les mains du greffier ou protonotaire, sous l'autorité de la XIVe clause de l'acte 22 Vic., ch. 5, et de la 46e clause de l'acte 23 Vic., ch. 57, que les déboursés faits par le Demandeur depuis le rapport de l'action exclusivement jusqu'au jugement inclusivement ; qu'ainsi, le dépot d'argent ne doit comprendre aucune partie de l'honoraire de l'avocat. (1)

2° Que l'Opposant n'est pas tenu de fournir au Demandeur copie de l'affidavit requis en tel cas.

Jugement avait été obtenu en vacance contre le Défendeur ; il se pourvut par opposition. Il annexa un affidavit original à

(1) V. art. 486 C. P. C.

l'original de son opposition, et déposa entre les mains du greffier le montant des déboursés qu'avait dû faire le Demandeur depuis le rapport de l'action exclusivement jusqu'au jugement, inclusivement, se réduisant à la *taxe* du *mémoire de frais* et au coût de la copie du jugement. Le Demandeur fit motion que l'opposition fût rejetée, alléguant que la somme déposée entre les mains du greffier n'était pas suffisante, au désir de la loi, et que l'Opposant n'avait pas annexé à la copie d'opposition destinée au Demandeur une copie de l'affidavit produit. Le Défendeur répondit qu'une opposition à jugement obtenu en vacance n'était rien autre chose qu'un plaidoyer, dont la production remettait de fait une cause au même état que l'eût fait la production d'un plaidoyer; que le privilège accordé à un Défendeur de se pourvoir par opposition contre un jugement obtenu en vacance trouvait sa compensation dans la facilité accordée à un Demandeur d'obtenir tel jugement; mais, que, comme on pouvait imputer au Défendeur une certaine négligence, pour n'avoir pas produit son plaidoyer au temps et en la manière ordinaires, par suite de laquelle un Demandeur devait faire certains déboursés, la loi avait voulu en rendre le Défendeur responsable, responsabilité comportant une obligation qui pourrait se traduire ainsi : " le Défendeur remettra au Demandeur les déboursés qu'aura faits celui-ci depuis le moment où le Défendeur aurait dû produire son plaidoyer. Quant au second point, le Défendeur prétendit que la loi ne requérait pas la copie d'affidavit demandée par le Demandeur, et qu'il n'apparaissait même pas que telle copie d'affidavit fût utile au Demandeur. La Cour a maintenu les prétentions émises par le Défendeur, M. le juge Badgley ajoutant que son opinion à ce sujet était partagée par ses honorables collègues. (5 *J.*, p. 101.)

BETOURNAY et RICARD, pour le Demandeur.

MÉD. MARCHAND, pour le Défendeur.

EXCEPTION DE DISCUSSION.

SUPERIOR COURT, Quebec, 3rd November, 1860.

Coram T. J. TASCHEREAU, Assistant Judge.

NOAD *et al. vs.* VON EXTER.

Held: That a plea of *exception de discussion* must be urged by an *exception dilatoire*, and not by an *exception péremptoire en droit temporaire.* (1)

The action was instituted to recover from Defendant the sum of £500. The declaration set forth, that, on the 2nd September, 1850, in consideration that Plaintiffs, at the request of Defendant, would make advances in cash, merchandize, or otherwise, to McDermot & Walsh, of Port Hope, and would assist them in their business, Defendant promised and bound himself, by an agreement in writing, to be responsible to Plaintiffs for the due payment of a sum not to exceed £500, should the same ever become due to Plaintiffs by McDermot & Walsh, and should the latter fail to pay Plaintiffs; and that it was further agreed that the guarantee so given should be a continuing guarantee, to cover and meet all accounts and general balances, and continue to be binding on Defendant till revoked, and notice given by him to Plaintiffs of discontinuing his undertaking; that Plaintiffs advanced and paid out monies for McDermot & Walsh, whilst the guarantee remained unrevoked, and until the year 1857, when there came to be due and owing from McDermot & Walsh to Plaintiffs the sum of £733 4s. 1d., as and for a general balance of account stated and settled between them and for which sum McDermot & Walsh gave their two promissory notes in favour of Plaintiffs, and upon which two notes Plaintiffs subsequently recovered judgment against them; that this judgment still remained unpaid and unsatisfied, and, in consequence thereof, Defendant, in virtue of the above guarantee, was liable to Plaintiffs for the sum of £500, and prayed judgment for this amount. Defendant pleaded by temporary *exception péremptoire en droit,* among other things, that Defendant, by the above guarantee, did not render himself unconditionally liable, but merely made himself responsible, in the event of McDermot & Walsh being proved to be insolvent, and that, not only were they not proved to be insolvent, but that, on the contrary, they were, to the knowledge of Plaintiffs, possessed of moveable and immoveable property of much greater value than

(1) V. art. 130, C. P. C.

the amount of their just debts, including the sum of £734 4s. 1d., due Plaintiffs, which sum Plaintiffs, both previously to the institution of the action, and still could realize out of the moveable and immoveable property, together with all costs, charges and other incidental expenses, by taking the necessary legal proceedings to discuss the same, and more particularly, by discussing the immoveable property situated in Port Hope, and described in the deed by which McDermot & Walsh had mortgaged the same in favour of Plaintiffs for the sum of £734 4s. 1d., the plea also repeated a description of the immoveable property, and concluded by setting forth the willingness of Defendant to deposit in court the necessary funds to enable Plaintiffs to discuss this immoveable property, and prayed that the action for the present, be dismissed. Plaintiffs demurred to this plea.

VANNOVOUS, in support of the demurrer, pleaded that the allegation in the plea amounted to an *exeeption de discussion*, and ought, therefore, to have been urged by *exception dilatoire*, and could not be made the subject of a temporary *exception en droit ;* and that, when made the subject of a dilatory plea, it must be accompanied by a deposit of money, to enable the creditor to discuss the principal debtor's estate, which must be fully described in such *exception dilatoire.* (1)

BAILLARGÉ, for Defendant, contended, that the *exception de discussion* could be as well pleaded by *exception temporaire* as by an *exception dilatoire*, both pleas having the same object, namely, to suspend temporarily Plaintiffs' claim ; (2) and that the declaration ought to have alleged the insolvability of the principal debtor, and the *caution* subrogated to all his rights. (3)

TASCHEREAU, J. : L'exception de discussion devra être plaidée par une exception dilatoire, et non par une exception temporaire en droit. L'exception de discussion n'est que dilatoire, et, au moyen d'icelle, la caution ne peut que demander qu'il soit sursis à l'action du créancier contre elle, la caution, jusques après la discussion ; et cette exception ne doit pas tendre ni conclure à exclure entièrement la demande du créancier, comme le Défendeur a fait par la présente exception péremptoire en droit temporaire, parce qu'il demande le

(1) 1 Pigeau, p. 186, 187 ; Pothier, Ob. n° 410, 412, 413.

(2) 1 Pigeau, pp. 186, 188 ; 1 Ferrière, *Dictionnaire de droit*, p. 697 ; 2 Charondas, p. 698 ; 3 Burlamaqui, p. 300 ; 2 Merlin, vo *Discussion*, p. 97 ; 18 Duranton, vo *Cautionnement*, cap. 2, sec. 1, pp. 341, 343, 346, 352, 357, 359, 367, 374 ; 3 Troplong, cap. 6, pp. 363, 369 ; 3 Toullier, art. 799.

(3) Pothier, *Obligations*, n°s 377, 406 ; 1 Ferrière, *Dictionnaire de droit*, pp. 339, 340 ; 18 Duranton, vo *Cautionnement*, pp. 419, 425 ; 2 Merlin, vo *Cautionnement*, p. 99.

renvoi de l'action quant à présent, au lieu de demander la discussion aux fins sus-exprimées. Les autorités citées par le Défendeur tirées de Pigeau, p. 187, sont contre lui. Demurrer maintained. (5 *J.*, p. 102.)

VANNOVOUS, for Plaintiffs.

BAILLARGÉ, for Defendant.

LOWER CANADA GAME ACT.—VIOLATION OF; AND HUSBAND'S LIABILITY FOR THE ACT OF HIS WIFE.

SUPERIOR COURT, Quebec, 3rd December, 1860.

Coram A. STUART, Judge.

REGINA, *ex relatione*, CAMPBELL, Complainant, *and* JOHN O'DONAGHUE, Defendant.

Held: That the husband, though absent, was liable for the penalty under the game act, on the ground that his wife acting as his agent in the ordinary course of his business, must be presumed to have had his authority for the illegal act complained of.

Defendant's wife, conducting her husband's business as a huckster, was, during his absence, found in possession of a wild duck, on the 14th August, 1860, in violation of the Lower Canada game act. An information was lodged before R. Nettle, superintendent of fisheries for Lower Canada, and a justice of the peace, against Defendant, a huckster, for having, between the 20th May and the 20th August, 1860, to wit, on the 14th August in said year, at Quebec, possessed a wild duck of the kind known as black duck, in contravention of the Lower Canada Game Act, 22 Vict., cap. 103. Defendant pleaded "not guilty," and the evidence established that, on the day in question, Defendant, was absent from the province and in New-York, in the United States of America, and that it was his wife who was in possession of the black duck, while serving in her husband's stall, in the market place. Upon these points, the magistrate, after due deliberation, convicted Defendant and imposed a penalty of $20 and costs, and in default of payment, one month's imprisonment. The case was removed by *certiorari*, at the instance of O'Donaghue into this court.

IRVINE, for O'Donaghue, argued, that the conviction was bad, inasmuch as O'Donaghue was absent from the province at the time the alleged offence was committed, and that he could not vest in his wife authority to commit an illegal act.

AUSTIN, for Complainant, contended, that, in certain cases of which this was one, though partaking of the nature of a criminal act, it was also considered as a subject of a civil

nature, and that Defendant was therefore liable for the act of his wife, on the ground that, acting as his agent, in the ordinary course of her husband's business, she must be presumed to have had his authority to do the act complained of.(1)

STUART, Justice, observed that there was no legal ground for setting aside the conviction of the magistrate; that the principle contended for, on behalf of the Complainant, was clearly established, and that the wife, acting as the agent of her husband in the ordinary course of his business, the magistrate had a right to presume that she had his authority for the illegal act complained of. *Certiorari* quashed. (5 *J.*, p. 104.)

AUSTIN, for Complainant.

HOLT and IRVINE, for Defendant.

INSOLVENCY.—VOLUNTARY ASSIGNMENT.

COURT OF QUEEN'S BENCH, Montreal, 9th March, 1861.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MONDELET and BRUNEAU, Justices.

DUNCAN MCFARLANE et al. (Plaintiffs in the Court below), Appellants and JOHN G. MACKENZIE et al. (Garnishees in the Court below), Respondents, and *E contra*. On a cross-appeal between the same parties.

Held: That a voluntary assignment, by an insolvent debtor, with the sanction of the greater number of his creditors, which contains a condition, that the debtor is to have a full discharge, is inoperative as regards a dissenting creditor.

That a dissenting creditor may by *saisie-arrêt*, attach the debtor's estate as well in the hands of the assignees, as in the hands of *a vendee*, to whom they have sold the entire estate.

That a vendee to whom the assignees have sold the entire estate, the next day after receiving it, being himself a party to the assignment, is accountable for the estate to a dissenting creditor, notwithstanding that the assignees acknowledged payment by him in full of the price stipulated, and he must as well as they, make his declaration specifying the goods and monies he has received.

That the declarations in such deeds make proof against the parties thereto, but form no evidence against a dissenting creditor.

The appeal was from a judgment rendered in the Superior Court, Badgley, J., 31 March, 1859, on a contestation which arose between Duncan MacFarlane, as Plaintiff, and John G. Mackenzie, William Whiteford, and John Lovell, on their declarations as garnishees. The remarks of the Judge in the court below are reported in 7 R. J. R. Q., p. 436, and the judgment was in the following terms: "The court considering that

(1) Paley, *on Convictions*, p. 60, and cases there cited; 2 Starkie, *on Evidence*, p. 44, in notes.

the parties contesting the declarations of the *tiers-saisis*, have not established the material averments of the contestation, and, considering that the *tiers saisis*, John Gordon Mackenzie, and William Whiteford, became, in good faith, under and by virtue of the deed of assignment to them made by Defendant, the assignees of the estate of Defendant, to wit, of his stock in trade, debts and effects, and trustees of his estate, for the benefit of his creditors, with power to realize the estate for the best advantages of the creditors. And did, in like good faith, and for the like advantage of the creditors, as such assignees and trustees, realise the estate, by selling the same to John Lovell, another of the *tiers-saisis*, by deed of sale to him, by them made, for the consideration in the deed of sale set forth. And, considering that no fraud or collusion hath been established against the *tiers-saisis*, or either of them, by the assignment and sale severally made as aforesaid, doth dismiss the contestation as regards the *tiers-saisis*, John Lovell. And, considering that, in and by the deeds of assignments and sale, John Gordon Mackenzie and William Whiteford, assignees and trustees as aforesaid, became entitled to receive, and received the consideration money of the sale, for the benefit of Defendant's creditor, and among others of the contesting parties, and, as such, have thereby to account and pay to the contesting party, their dividend or rateable proportion of the consideration as and upon the amount of their claim against the estate, notwithstanding the clause in the deed of assignment contained, limiting such dividend or proportion, to the creditors consenting to Defendant's discharge, by virtue of the deed of assignment; which limitation is by this court declared to be ineffectual, with reference to the claim of the contesting parties. Doth maintain the contestation, in respect of the dividend proportion, and doth condemn the *tiers-saisis* John Gordon Mackenzie and William Whiteford, jointly and severally, to account and pay to the contesting parties, within fifteen days after service upon them or either of them of this judgment, their dividend or rateable proportion upon the estate of Defendant, and of the consideration money aforesaid, under the deed of sale; failing which, that the *tiers-saisis*, John Gordon Mackenzie and William Whiteford, do pay, jointly and severally, to the contesting parties, Plaintiffs *par reprise d'instance*, the amount of their debt, interest and costs, and subsequent costs, under and by virtue of the judgment obtained by the Plaintiff Duncan MacFarlane, against Defendant, on the twenty-third day of October, 1854; and, namely, the sum of £211 7 1, the principal of the judgment, with interest upon the sum of £210 10 9, from the twentieth day of January, 1854,

until paid, and the costs of the judgment, taxed at the sum of £19 14 5, and the subsequent costs accrued.

AYLWIN, J.: This case turns upon the sufficiency of a voluntary assignment made by an insolvent debtor, in favour of two of his creditors, containing a condition, that he should have a final and complete discharge from his creditors on their obtaining their respective dividends from these two assignees. It will be decided in the same sense as has been done by this tribunal, where the like principles have been involved. The facts show that the debtor, William Harry Delisle, finding difficulty in carrying on his business, as early as the month of March, 1854, disclosed the state of his affairs to his creditors. He endeavoured to make arrangements with them, and, by that means, attempted to extricate himself from his difficulties. Under the arrangements that took place, about this time, some of the creditors got 5s. in the £., but Plaintiff MacFarlane was one of those who received nothing on account of his claim. Delisle's business declining, as is usually the case in such embarrassments, matters grew worse, Plaintiff, the late Duncan MacFarlane, of Glasgow, in Scotland, who is now in the suit by his representatives, brought his action, and, on the 23rd October, 1854, obtained judgment for his claim, amounting to £211 7s. 1d., besides interest and costs. One month before this judgment was obtained, viz. on the 23rd Sept. 1854, Delisle executed the voluntary assignment of his stock in trade and assets, in favor of Mackenzie and Whiteford, two of Respondents, who on the following day, executed a deed of sale of the whole of the estate to Lovell, the other Respondent, who was also a party to the asignment as a creditor accepting the composition. Plaintiff MacFarlane, on the 7th December, 1854, sued out a *saisie-arrêt*, to attach the estate in the hands of Respondents, in satisfaction of his judgment; to this they appeared and severally declared that they had nothing. These declarations were contested by MacFarlane, on the grounds that the garnishees had received all the estate of the insolvent debtor, that the deeds were inoperative as regards him, and he had a right to deal with the insolvent's estate by course of legal proceedings and judicial sale. He alleged that the deeds had been executed in fraud of his just rights, and by collusion between the garnishees and Defendants, with the view of coercing him into granting a full discharge to Delisle his debtor, which he was not bound to do; and that other creditors had previously got 5s. in the £. while he had got nothing. The assignment contains a condition, that the estate of Delisle should be distributed among certain persons, named as his creditors in a schedule annexed, on their giving and granting to him a full and final discharge and

acquittance. This condition is quite illegal, and is enough of itself to vitiate the deeds, as regards MacFarlane, seeking his recourse by legal process as a creditor. Neither the assignees, nor the debtor, had any right to impose such a condition on any creditor. Lovell appears in the first deed as a creditor, and is therefore cognisant of the state of the debtor's affairs. The next day, he takes an assignment of the whole estate. There were certain schedules annexed to these deeds shewing the insolvent's stock in trade, to amount in money and money's worth to £4777 14s. 8½. An amount in excess of his liabilities as therein stated. All this passed into the hands of Lovell, for a sum of £2263 6s. 10d., declared to have been paid at the time, without any advertisement of the property, or regular means being taken to ensure its realising the greatest amount. Irrespective of the deeds, the parties proceeded to proof, and the pretensions of Appellants seem to have been resisted on the ground that no one had suffered. But, how can it be so determined, it is not enough to get persons to say as was done in this case; that in their opinion the best had been done for the creditors. Had the property been brought to a judicial sale, it would have been competent for Appellants to appear there, and by making their bids, ensure the full value thereof being realised. The law requires complete equality in the distribution of the insolvent's estate, and its procedure by the publication which is presumed to take place of judicial sales, guarantees, to creditors the necessary opportunities for protecting their interests. Again Respondents seem to have acted on the erroneous supposition, that the deeds were proof of theirs contents against Appellants, although no parties thereto. This cannot be, as against Appellants, they are evidence of no more than the fact that the parties to the deeds appeared before notaries, and declared a certain state of things to exist as between themselves, affecting in no respect Appellants, and others who were no parties thereto, and are, inoperative for a binding acknowledgment as against the Insolvent's Estate having been made after his *déconfiture*. Respondents agreed to the terms of those deeds, and discharged their debtor; they are themselves bound by the deeds, not so Appellants, McFarlane always objected to this arrangement. The true principle applicable, in this respect, was declared in the decision of *Bryson* vs. *Dickson*; (1) in the contest that there arose as regards the estate of the insolvent Sawtell. In that case, Dickson had a judgment, the same on which the insolvent's estate was realised, and yet it was decided to be no proof as against an opposing creditor contesting, who had himself proved his

(1) See 3 R. J. R. Q., p. 426.

claim. For the present case, Respondents have much less evidence than Dickson had. They have the mere declaration of themselves, in conjunction with their alledged debtor after his admitted insolvency, an act *inter alios* as regards Appellants who have proved their debt, which is not only not denied but is expressly admitted in the schedule of creditors. It was incumbent on Respondents to have produced proper and sufficient evidence of their claims, which they have not done. On this ground alone, I would be prepared to reverse the judgment of the court below. So much for the facts, we come now to discuss the principles of law, applicable to the controversy. Our law requires that there should be perfect equality in the distribution of the insolvent's estate. It imposes an absolute disability on the debtor, once insolvent, to exercise control in the disposal of his estate, which by operation of law, becomes the property of his creditors, as pledged to them and all of them, so that conveyances of it by him, are totally inoperative, without the consent of all the creditors. The ordinances of the French kings are positive, and contain a distinct prohibition against the insolvent debtor alienating his property. These ordinances are binding upon the courts, as part of the law of this country. It has been contended that there was no fraud in the arrangement made for the disposal of Delisle's assets, and that the parties being in good faith, the agreements should be maintained. There has been no design to defraud, nor any acts perpetrated that could be designated as immoral, by any of the parties here. But the attempt has been made to introduce an insolvent system which does not exist, and is unknown to our laws. The commercial community must learn, that it is not in their power to do so and that such arrangements cannot receive the sanction of the courts. I am sensible that the judgments of the court on these questions, are to create a great revolution in the usages of the commercial community here. I am aware that a practice has prevailed here, of making these voluntary assignments, sometimes with the sanction of a majority of the creditors. It has been introduced from the state of New-York, where the law authorized it, but it ought to be known that it is not law in Lower Canada, and can only become so, when it shall have been declared by the Legislature, if they should choose so to do. The garnishee Whiteford declared he had nothing, and yet when he afterwards pleads his special answer to the contestation he alleges that he had a note of John Lovell's for £102 5s., which he then produces, as the amount of dividend, which the assignees proposed to give to McFarlane. By the assignment, they were only authorised to give the dividend on getting a full discharge for Delisle, and yet he is here willing to exceed his authority, and tenders the

note, without demanding the discharge. I do not know how this note comes to be produced, nothing was said about a note in the sale to Lovell. It is not tendered until overdue, and being payable to Whiteford is not endorsed by him, so that McFarlane could not in any way avail himself of it, besides was Whiteford authorized to take a note ? Lovell is probably a very respectable man, but how can this court know that J. Lovell who signs the note, is good for any thing. How can they tell that it is of any value whatever. The Hon. Judge of the court below, in maintaining the contestation as regards the other garnishees, dismissed it without costs as to Lovell, this court are of opinion that he was wrong in exempting Lovell from liability. Lovell seems to have become possessed of the insolvent's property, which he thinks fit to retain for a long period of time; viz, until July, 1855, when he sends portions of it, in an irregular manner, to the auction room of Benning and Barsalou, to be sold. He is answerable to the party who has not acceded to the arrangement whereby he got the property, if it had been sold in the regular way, that party could have come forward, and, on the property being duly advertised, could have made his *enchères*, so as to have it realize its full value. Lovell must be held in common with the other garnishees to make a new declaration in which they must state in a specific manner, what property was received by them, when it will be competent to Appellants, by another contestation, to maintain that the property was sold for little or nothing, or under its value, or such other grounds as may be available to them. The judgment is erroneous in another particular, in decreeing that, in default of a rateable proportion being paid to Appellants, they shall be paid their debt, interest and costs in full. They ought not to be awarded the full amount of their debt, unless the estate be sufficient to pay in full. What we have to deal with is our own law, and sanctioning its principles, our legislature has recently given a remedy in certain analogous cases. I refer to the 87th cap. of the Consolidated Statutes of Lower-Canada, by which not only is a creditor entitled to *saisie-arrêt*, if the debtor refuses to compromise or arrange with his creditors, but even to capias, or if he refuses to make a *cession de biens* for the benefit of his creditors generally. If he refuses to do either, he is held to be about to secrete his estate, with intent to defraud his creditors generally, or the Plaintiff in particular. The present case arose before the passing of that law, but, unquestionably, the arrangement made was to the prejudice of Plaintiff in particular, and had illegal conditions attached to it.

MONDELET, J.: The reasons I have for concurring in this judgment, are the same as have been given by me on the

occasion of other judgments rendered by this court. It is not necessary for us to find actual premeditated fraud, to hold such arrangement invalid. It is sufficient that there should be legal fraud, resulting from the presumption of inequality in unauthorized appropriations of the debtor's property. By the law of Lower Canada the moment a debtor is *en déconfiture*, his property becomes the gage of all his creditors equally.

Judgment of the Queen's Bench: The court, seeing that the deed of composition and assignment in question between the parties bearing date the twenty-second day of September, 1854, before Mtre Doucet and his colleague, notaries, at Montreal, was one *universorum bonorum*, and was made and entered into by William H. Delisle, a debtor notoriously insolvent, upon the express condition that the creditors, parties to the same, should give and grant to him a full and final discharge and acquittance, of all further claim or demand generally whatsoever, and not otherwise; seeing that Appellants, as representing the late Duncan MacFarlane, Plaintiff in the court below, are not bound by said deed, not being parties thereto, and that the same was made in prejudice of his rights, as a then existing creditor, recognized by the judgment by him subsequently obtained against William H. Delisle, to wit on twenty-third day of October, 1854, in the Superior Court, at Montreal, and that such deed being *res inter alios acta*, and importing upon its face an illegal preference of certain creditors, is inoperative in so far as concerns the late Duncan MacFarlane and Appellants, and conferred no trust power in favour of Respondents John G. Mackenzie and William Whiteford, as by them asserted; seeing, that the sale of the whole of the estate and effects of William H. Delisle, made as trustees by Respondents John G. Mackenzie and William Whiteford, to Respondent John Lovell bearing date the twenty-third day of September, 1854, before Mtre Doucet and his colleague, notaries, was entered into with a full knowledge of, and with express reference to the said composition and assignment, which bears date the day previous, and to which Lovell, as a creditor, was a party, and that the said sale was and is inoperative and void, as to the late Duncan MacFarlane, who refused to join in the same; seeing that Respondents have not shown in proof that the statements, contained in the deed of composition and assignment, and in the deed of sale were true, and that said instruments afford no evidence of their contents as against Appellants; seeing that Respondents have wholly failed to establish their pleas or answers to the contestation of their declaration respectively as garnishees, set up by Appellants; seeing that Appellants have sufficiently established the facts by them alleged in their said contestation; seeing, therefore, that in the judgment of

the court below, by which the contestation was dismissed, in so far as respects Lovell, and the conclusions thereof were modified in so far as Makenzie and Whiteford, the supposed trustees and assignees are concerned, there is error. It is considered and adjudged, by the court now here, that the judgment, rendered in the Superior Court, at Montreal, on the thirty-first day of March, 1859, be and the same hereby is reversed, annulled and set aside, and, proceeding to the render the judgment which the court below ought to have given, the said deed of composition and assignment, and said deed of sale to Lovell, are hereby declared void and inoperative as against Appellants, and it is further considered that, by reason of the insufficiency of their previous declarations Respondents, and each of them, do, within one month from the service of the present judgment, appear *de novo* in the court below, and being then and there sworn to that effect, do make a further and amended declaration as garnishees, conformably to the fact, specifying in detail all each and every the sums of money by them received and all the goods, chattels and effects, which came into their possession, custody or power, under and by virtue of the two deeds, as belonging to the insolvent estate of William H. Delisle, to the intent that thereupon such other and further proceedings be had, and taken as to law and justice appertain, in the premises. (5 *J.*, p. 106.)

CROSS and BANCROFT, for MacFarlane *et al.*

A. and W. ROBERTSON, for Mackenzie *et al.*

F. G. JOHNSON, Q. C., Counsel.

GAGES DES MATELOTS.

SUPERIOR COURT, Montréal, 31 octobre 1860.

Before Smith, Justice.

Ex parte WARNER, *for writ of certiorari.*

Dans une action pour gages par un matelot à bord d'une barque.

Jugé: 1° Que l'inspecteur et surintendant de police pour la cité de Montréal a les mêmes pouvoirs que deux juges de paix.

2° Qu'en autant que les matelots ont un gage et un droit *in rem* pour leurs gages, le propriétaire sur le registre était responsable pour gages échus jusqu'au jour de son acquisition.

3° Que, de plus, le requérant était tenu d'alléguer dans son plaidoyer le nom de la personne de laquelle il avait acheté la barque.

4° Que la défectuosité dans la sommation qui alléguait que la barque avait été dûment enregistrée dans la province du Canada, était écartée par la conviction qui constatait que la barque avait été dûment enregistrée dans le Bas-Canada, (1)

(1) *V. S. R. C.* de 1886, ch. 74, s. 52 et 55 et ch. 75, s. 30 et 33.

A motion was made for a writ of *Certiorari*, to remove a conviction by C. J. Coursolles, Inspector and Superintendant of Police for the city of Montreal, condemning applicant to pay Joseph Bérard the sum of $34.60, for balance of wages, as sailor on board the barge *Adélaïde*, from the 12th August to the 20th September, 1860. The writ of summons was dated on the 17th September, 1860, and the barge was therein alleged to be duly registered in the province of Canada. The affidavit of circumstances set up that applicant appeared and pleaded that he was not the owner of the barge at the time the services were rendered; that he bought the barge from a person whom he did not name, on the 19th September, 1860, and was not liable for wages, and that the action should have been brought against the former owner. These grounds were urged as reasons for obtaining the writ, also that the magistrate had no jurisdiction, that it should have been averred in the summons that the barge was registered in Lower Canada.

SMITH, Justice : Said that, by law, the inspector and superintendent of police for the city of Montreal had the same powers as two justices of the peace. That, as seamen have a *lien* and a right against the vessel *(in rem)* for their wages, the registered owner was liable for wages accrued up to the date of his purchase. That, moreover, the applicant was bound to have set up in his plea the name of the party from whom he bought the barge, and that the defect in the summons which set forth that the barge was duly registered in the province of Canada was cured by the conviction which stated the barge to have been duly registered in Lower Canada : Writ refused. (11 *D. T. B. C.*, p. 115, et 5 *J.*, p. 120.)

CARTER, for Applicant.

RIVARD, for Seaman.

ENQUETE.—TEMOINS.

SUPERIOR COURT, Montreal, 28 février 1861.

Before BERTHELOT, Justice.

DAVID *vs.* MCDONALD *et al.*

Jugé: Qu'en vertu du statut de la 23e Vic., cap. 57, sec. 51, un co-Défendeur peut être examiné comme témoin par un autre coDéfendeur. (1)

This was an action of damages against McDonald *et al.*, builders, and Hopkins *et al.*, architects, jointly and severally, for damages alleged to have been sustained by Plaintiff, by

(1) V. art. 251 et 252 C. P. C.

reason of the sinking of the floors, in a shop belonging to Plaintiff; McDonald *et al.* had done the work, and the architects had made the plans. The Defendants severed in their defence, and, on one of the builders being brought up at *enquête*, as a witness for the architects, an objection was taken by Plaintiff which was ordered by Mr. Justice SMITH to be heard in term.

BERTHELOT, Justice: I have consulted with my brother judges, and we hold that, under the recent statute, any codefendant can be examined. This was almost admitted by Plaintiff's counsel as being the interpretation to be given to the statute in question." (1) Judgment, that examination of witness be proceeded with. (11 *D. T. B. C.*, p. 116.)

BETHUNE and DUNKIN, for Plaintiff.

MCKAY and AUSTIN, for McDonald *et al.*

ROBERTSON, A. and W., for Hopkins *et al.*

ARCHITECTE, ENTREPRENEUR, RESPONSABILITE.

COURT OF QUEEN'S BENCH, Montreal, 12th November, 1863.

Coram Sir L. H. LAFONTAINE, Bart., C. J., DUVAL, MEREDITH, Justices, and MONDELET, A. J.

MOSES E. DAVID (Plaintiff in court below), Appellant, *and* ALEX. MCDONALD et al. (Defendant in the court below), Respondents, *and* the said ALEX. MCDONALD et al., Appellants, *and* the said MOSES E. DAVID, Respondent, *and* JOHN W. HOPKINS et al. (Defendants in Court below), Appellants, *and* the said MOSES E. DAVID, Respondent.

Held: 1° That, where the floors of a building have sunk, in consequence of the insufficiency of the timber used to support the bridging joists and floors, the architects and superintendent-, and the carpenters and joiners, employed in erecting the building, are jointly and severally responsible for the damages incurred.

(1) "And any person who may be challenged as a witness on the ground of being interested, may give evidence in Courts of Justice, but the evidence of such witness shall have its weight with the Judge, according as he may be deemed entitled to credibility." 23rd. Vic., cap. 57 sec. 51.

"Any party in a cause may be summoned and examined as a witness by any other party in the same cause, and the party, so summoned et examined, may be cross-examined as a witness by his own attorney, if he be so represented and the evidence given by any such party may be made available to the party obtaining it, or not, as he may think proper, provided that he declare his intention, at the close of his *enquête*, to avail himself of such evidence or not; but no such evidence shall be turned to the advantage of the party giving it."

"Every party so summoned shall be taxed as any other witness." 23rd. Vic., cap. 57, sec. 49 :—Consol. Stats. L. C., p. 698.

2° That parties thus *solidairement* liable may be sued in one and the same action.

3° That, in estimating such damage, allowance will be made in favour of ths architects and contractors for what the works would originally have cost, had timber been originally used of a size and quality sufficient to support the bridging joists and floors.

4° That, in estimating such damage, no allowance will be made to the proprietor for moneys paid by him to his tenants, for actual expenditure by them in removing out of the building, during the time that the necessary repairs are being made. (1)

These were appeals from a judgment rendered by the Superior Court, at Montreal, on the 28th day of February, 1862, condemning Respondents and Appellants A. and A. McDonald and Hopkins, Lawford and Nelson, jointly and severally, to pay to Appellant and Respondent David, the sum of £51, 1s. 8¾d. with interests from the 24th September, 1859. The action in the court below was brought against A. and A. McDonald, as the contractors, and Hopkins, Lawford and Nelson, as the architects and superintendents, for the recovery of £420, for damages incurred by David, by reason of the sinking of the floors of the second and third stories of a building on great St. James street, belonging to him, in which A. and A. McDonald had executed and performed all the carpenter's and joiner's work connected with the alteration and conversion of the same " into three stores," according to certain plans and specifications, prepared by and under the superintendence of Hopkins, Lawford and Nelson. The sinking of these floors, which was to the extent of one or two inches, commenced very shortly after the stores were occupied and was caused by the insufficiency of the timber and materials used by A. and A. McDonald to support the bridging joists and flooring. A. and A. McDonald pleaded firstly an exception of cumulation, which was dismissed on the 31st December, 1859 ; secondly, an exception to the effect, " that they were mere jobbers, labouring carpenters and not professional architects," and that everything they did was done " under the superintendence, control, direction, orders and approval " of said Hopkins, Lawford and Nelson, and of Plaintiff ;" and further that the sinking of the floors was caused by Plaintiff or his tenants having " overloaded the floors of said buildings, at divers times, in a careless, negligent way," Hopkins, Lawford and Nelson pleaded an exception to to the form, on the ground that they had been improperly joined in the action with A. & A. McDonald, which was dismissed on the 31st December, 1859. They also pleaded that Defendants " are architects, and were requested by Plaintiff to " make plans and specifications for carrying out certain

(1) V. art. 1688 C. C.

" alterations which Plaintiff proposed to make in an old
" building belonging to Plaintiff, situated in Great St. James
" street, and running through to Fortification lane, restricting
" and binding the cost of said alteration, which plans and
" specifications were made in a proper and workmanlike
" manner, and were found fault with, and were by Plaintiff and
" by his directions, and were reduced as to outlay and ex-
" pensiveness, Plaintiff insisting on the cheapest possible mode
" of carrying out his views, and that the old floors were
" retained by Plaintiff from motives of economy, and only
" finally determined to demolish the old flooring when three
" fourths of the floor joists had been laid, and Plaintiff objected
" from the same reason to girders being placed on the
" stores, and diminished the size of certain timbers, and
" omitted others ; That the plans and specifications made
" were made to carry out Plaintiff's views, and without any
" warranty of any kind, and were revised and altered by
" Plaintiff's request to suit his views ; that Defendants
" never made the representations in Plaintiff's declaration
" referred to ; that the allegations in the declaration, that the
" floors of the second and third stories had sunk two inches
" by insufficiency of the timber used by Alexander and Allan
" McDonald to support the bridging joists and the flooring,
" and was attributable to the want of care, skill and attention
" of Alexander and Allan McDonald and Hopkins, Lawford
" and Nelson, in the erection and completion of the works,
" being the only allegations as to failure want of skill or
" neglect on behalf of the Defendants, now pleading, is so
" vague as to prevent the Defendants, now pleading, from
" answering thereto ; that said allegation, in so far as it
" intends to impute blame to Defendants now pleading, is
" denied, as also any joint and several liability on the part of
" Defendants now pleading with Alexander and Allan McDo-
" nald ; That moreover the front wall of the building, built by
" Payette and Perreault, settled several inches, and Defendants
" now pleading, recommended that it should be taken down,
" and Plaintiff nevertheless, compromised with the builders
" by deducting a large sum from their contract, to wit four
" hundred dollars ; thereby, in the management and the
" carrying on of said works, asserting his own right to control
" the performance of the work, as well as the cost and the mode
" of carrying on the same ; that moreover, if any damage was
" caused to Plaintiff, it was by his agents and servants, and not
" by Defendants now pleading, and if the sinking had been
" alleged to be attribritable solely to the wave of skill and care
" of Defendants now pleading, instead of being alleged as in the
" Plaintiff's declaration is set forth, and if it were proved to have

" been so attributable, yet Plaintiff could not recover the damage " set forth, which is not direct damage, flowing from such " want of care and skill or from neglect; that moreover " Plaintiff's expenditures were not the legitimate or necessary " results of such alleged sinking, but were, in fact, wholly new " works, and were made with a view to improve said property " and the same cannot be brought against any of Defendants " or recovered in this action." On the 30th September, 1861, the Court (HON. MR. JUSTICE SMITH, presiding) rendered the following interlocutory order: "The court, considering that Plaintiff hath fully proved and established that the second and third flooring or the stores, erected by Defendants, under the contracts and agreements seth forth had given way and sunk, and further, considering, that it hath been fully proved and established that the sinking of the floors was occasioned by the want of care and skill of Defendants in using insufficient materials, inadequate to the weight of the flooring to be constructed, and that by reason thereof, and by law, Defendants became and are jointly and severally liable, as complained of in and by the action; and, further, considering that it is not satisfactorily proved what sum of money would be requisite to place the flooring in the condition in which it ought to be, under the terms of the contract entered into by the parties, in conformity to the specifications under which the stores were erected, and that, by the contract secondly entered into by Plaintiff and Alexander McDonald, and bearing date at Montreal the nineteenth day of March, 1859, the specifications were altered so as to meet the changes set forth in the contract, and that it is not possible to determine what portion of such new works had reference to the flooring exclusively, or to the sum of money absolutely necessary to be expended, in order to remedy the defects complained of, the court, *avant faire droit* on the amount of damage which Plaintiff is entitled to claim, by reason of the defects complained of, doth order, that within fifteen days after the entering of the present judgment, *experts* be named by the parties, *sinon d'office* by this court, or a Judge thereof, in vacation, and said *experts* will visit the stores, and by examination of the specifications under which the stores were erected, and by the examination of witnesses, if necessary, to be first duly sworn before a commissioner duly authorized to take affidavits to be used in this court, to estimate what sum of money it would be necessary to expend to have the flooring made safe and sufficient to meet the requirements of the specifications, and to make their report on or before the seventeenth day of February next." On the 17th February, 1862, the *experts* made the following report: "The undersigned *experts* named for the purposes of the judgment

in this cause, of date 30th September last past, being duly sworn before a commissioner duly commissioned for taking affidavits for this court, do submit the following report, which, in our judgment, will form a basis for the due consideration of the court, to arrive at a settlement of so complicated a question in points of law and justice to all parties interested. First, we are unanimously of opinion that Plaintiff has sustained no damage to the stores by the sinking of the second and third story floors as complained of; secondly, having visited the stores, in company with Plaintiff's Alexander McDonald and James Nelson, two of Defendants, and being fully satisfied, from a thorough investigation of the building in connection with the original plans, specifications and contract in all their parts, and from various questions answered by Plaintiff and the two Defendants above named on the points at issue, that the sole cause of the sinking of the second and third story floors was caused by the weakness of the timbers, and not from any other cause or defects in the material or labour employed in the building; thirdly, having examined Tevil Appleton, he doth state that he examined the stores, and submitted a report in connection with D. McNiven to Plaintiff, bearing date 3rd Feby, 1859, and was employed by Plaintiff to make out a new specification and plan for the strengthening of the second and third story floors. He further states that, the pilasters and beams were not necessary for the support of the top cealing, but were placed there for the benefit of Plaintiff in giving him an additional floor not contemplated by the original contract, plans and Specifications. He further states that, in taking down the floors, the timbering employed by the contractors, Defendants in this cause, was much stronger than the size specified, and of good sound timber; fourthly, having examined the plans and specifications under which the stores were erected, the materials used and the methods employed in checking and dovetailing the old beams into the new girders, which was done in the best manner and with the very best material, we further say that the deflection of the timbers was in consequence of a defective specification in the original contract in not providing for sufficient sized timber to sustain the weight intended to be put into the stores, and uot from any other cause; Fifthly, we further say that had Plaintiff carried out the instruction of his architects, as shown on original drawings, made and providing for and against all such deflections complained of, Plaintiff insisting upon cutting down expenses by employing all the old timbers in the new alterations and effecting a saving in the original contract as executed by Defendants, amounting to the sum of seven hundred and ninty-three dollars 58 cents, which Plaintiff would have

had to pay on the original contract; Sixthly, we further say that the amount of costs required to put in the timbering of sufficient size and strength for the two floors complained of, according to the first contract as executed by Defendants, would amount to the sum of $793.58: that is to say, Plaintiff would have had to pay the above sum as an extra amount, beyond the contract sum entered into by Defendants, during the progress of the building, under the second contract dated 19th day of March, 1859. The contract sum and value of the work done and executed was worth the sum of nine hundred and ninty-seven dollars 92½ cts., making a difference of costs between what the alterations would have cost, at the time of the first contract, during the progress of the works, and the second contract when the stores had been occupied, of the sum of two hundred and four dollars 34½ cts. S'd. HECTOR MUNRO, LAIRD PATON, WILLIAM RUTHERFORD." Recapitulation of the figures showing the amount Plaintiff would have had to pay as extra work beyond the plans and specifications as originally contracted, for the sum of $793.58. The amount of costs and value of the work done and executed by Alexander McDonald, under contract dated 19th March, 1859, the sum of $997.92½. Showing the difference betwixt what the extra work would have cost under the first contract as extra work, and the second contract as finished $204.34½. There is a large amount of extra work done, such as the top story flooring, beaming, plastering, and sundry other works which have been done and executed solely for the benefit of Plaintiff, and of which we have taken no notice, and have confined our estimate and value of the work done to the second and third floors complained of. Signed, HECTOR MUNRO, LAIRD PATON, WILLIAM RUTHERFORD." The case having been re-submitted on the reports of the *experts*, the court (HON. MR. JUSTICE SMITH) pronounced the following judgment on the 28th February, 1862; "The court, doth adopt and homologate the said report, and doth adjudge and condemn Defendants, jointly and severally, to pay and satisfy to Plaintiff the sum of £51 1 8¾ with interest thereon, from the 24th day of September, 1859, date of service of process until actual payment and costs of suit."

BETHUNE, for David, contended that the *experts* and the judge in the court below had erred, in deducting what David might have had to pay originally, had the timbers then been constructed of proper size and quality from the amount he actually expended in the repairs, as it was in evidence that none of the timber originally used was taken out in making the repairs; the new timbers being used merely as so much support to the old ones. The amount thus expended by David in putting in the new timbers was clearly in excess of all

he had expended originally; what was thus spent originally being so much sunk irrespective of and in addition to what he had to expend afterwards. Then the court below had not allowed any thing for the moneys David was obliged to reimburse to his tenants for their actual expenses of removing, &c, in consequence of the repairs, and which were proved to amount to $94.05.

MACKAY, for the contractors, contended that they and the architects ought not to have been sued together; that they could not legally be condemned in the same sum of damages; the liability of each set of Defendants flowing from different *faits* or contracts; that they abundantly proved all their pleas; that they were and are not liable as alleged; the architects themselves swear to this, and very honorably have taken all blame from of the contractors. David ought to have been content with his recourse against the architects. Much of the £420 sought by David he makes no proof of, and into it he would make enter an extra value, or *plus-value*, thrown into his building on the last occasion of their being repaired. Upon making these last repairs he used materials and did works never contemplated in 1856. The experts best able to estimate such things have reported upon everything; their report upon which the final judgment passed is for quite enough against the architects in favour of David.

ROBERTSON, for the architects, submitted the following points: 1st That the judgment on the preliminary exception should have declared the declaration insufficiently libelled and vague, and that Appellants were not bound to answer it; 2nd That no facts shewing a joint and several liability are alleged in the declaration; and that Plaintiff's action should not have joined matters arising from the contract with the McDonalds, with the claim against the Appellants; 3rd That the Plaintiff was the cause of this damage by his own act and by the instructions given to Appellants to make such plans as would reduce the cost and keep the old joists, and by not declaring that he required store houses of the strongest description, and by rejecting the plans as made by the Appellants; 4th That Plaintiff was not justified in making, at Defendant's expense, first-class stores, and improving them far beyond the extent contemplated; 5th That the only liability of Appellants was for fair and reasonable professional skill in carrying out the alterations in the building, but that there was no responsability or guarantee that the stores were to be sufficient to store the heaviest goods, the upper part being intended for light stores and for show rooms, for which purposes they were sufficient; 6th That the court erred in rendering the interlocutory judgment, and that the report, in so far as it lays liability on

Appellants, is erroneous, as well as the final judgment appealed from.

MONDELET, J., *dissenting* (taking up first the David Appeal): The Appellant concludes to the confirmation of the judgment to the extent of £51 1 8¾, but complains of it, inasmuch as he pretends, he should have obtained a condemnation for the whole amount he had sued for. Before I advert to the merits of the case, I have to say, that the *exceptions de cumulation* put in by the McDonalds and the others should have been maintained and the appellant ordered to *opter, à défaut de quoi,* his action should have been dismissed. I therefore think that, in that respect, the judgment which dismissed those *exceptions de cumulation* should be reversed, and, as a consequence thereof, the final judgment should be reversed. As to the merits, my opinion is that there has been no fault of the builders or architects: at least, it is doubtful whether they alone are to be blamed, the evidence as to David's own acts and directions, though not very satisfactory, still leaves enough upon one's mind as to lead to a favorable view of the case in favour of Defendants. Besides, it is proved sufficiently to induce belief that the beams and floors gave way and sank more from excessive pressure than from want of proper construction. I therefore think that, 1. the judgment of the court below should be reversed, in so far as the *exception de cumulation* is concerned. 2. Should the difficulty be got over, then it is my opinion that, if David is to get anything, he should not recover more than he has obtained by the judgment of the court below. But, here again, having serious doubts as to whether he is entitled to any thing, it is a matter, in my view of the case, which, there being a legitimate cause for doubt, Defendants should have the benefit of it and the action should be dismissed. The Honorable Judge then observed that the same remarks applied to the two other appeals which he was of opinion should be maintained.

SIR L. H. LAFONTAINE, Bart., Ch. J.: Toutes les parties, (Demandeurs et Défendeurs) ont appelé des jugements de première instance. On serait porté à dire que, puisqu'elles en sont toutes mécontentes, c'est que le jugement est bon à première vue. Et je le crois. Les deux McDonald sont charpentiers-entrepreneurs et, comme tels, sont associés ; les autres Défendeurs, Hopkins, Lawford et Nelson, sont architectes et aussi associés comme tels. En 1856, le Demandeur avait à faire faire à sa maison, au coin de la grande rue Saint-Jacques de cette ville, des changements qui nécessitaient des travaux assez considérables. Il employa à cette fin, comme architectes, les trois derniers Défendeurs qui firent les plans et devis, requis dans un tel cas. Les deux McDonald entreprirent les

ouvrages de charpente et de menuiserie, d'autres entrepreneurs, Payette et Perreault, entreprirent la maçonne. Les premiers plans et devis préparés par les architectes ne convenaient pas à ce qu'il paraît aux goûts économiques du Demandeur. Ils eurent à en faire d'autres dont l'exécution devait entraîner des dépenses moins considérables. Ces derniers plans, substitués aux premiers, furent donc choisis par le Demandeur. Si ses goûts économiques l'ont emporté en cette occasion, et s'il en a souffert par la suite, il a dû le regretter plus tard. Les ouvrages finis et certifiés par les architectes, le Demandeur paya les différents entrepreneurs et les architectes. Au commencement de l'année 1859, le Demandeur s'aperçut que le second et le troisième planchers avait baissé de près de deux pouces. Il proteste tous les Défendeurs le 9 février, par le ministère de notaires, et les somme de faire ou faire faire de nouveau les travaux qui avait été mal exécutés. Prétendant avec raison qu'en pareil cas, l'architecte et l'ouvrier entrepreneur sont responsables des dommages conjointement et solidairement, il se pourvut en demmages contre tous les Défendeurs par une seule et même action. Les architectes et les deux charpentiers ont plaidé séparément ; et les deux parties défenderesses ont présenté, chacune, l'exception de cumulation d'actions, laquelle exception a été déboutée. Le Demandeur, dans sa *déclaration*, allègue la confection des plans et devis faits à sa requisition par les trois architectes, le choix de ces plans et devis ; l'entreprise des deux McDonald, par acte notarié du 15 septembre 1856, la surveillance des architectes, avec toutes les clauses ordinaires en pareil cas, stipulées entre lui, le Demandeur et les charpentiers, au dit acte du 15 septembre, la confection de tous les ouvrages, les certificats des architectes, leur paiement et celui des ouvriers, puis l'affaissement des planchers et les dommages en résultant, attribuant le tout à l'insuffisance des bois et des matériaux employés par les charpentiers, et au manque de soin, d'habileté et d'attention de la part des dits McDonald et des dits Hopkins, Lawford et Nelson, puis le protêt du 9 février 1859, fait aux Défendeurs, la rejection par le Demandeur ou par ces ordres, des ouvrages qu'il avait dénoncés comme étant mal faits et défectueux, le coût que cela avait entraîné, savoir £420, " which by reason of the several premises and by law Plaintiff hath a right to recover from Defendants, jointly and severally, ajoutant " that Defendants have repeatedly acknowledged their liability aforesaid, but have hitherto wholly neglected and refused to pay the said amount last mentioned." Enfin le Demandeur prend des conclusions conformes. En y apportant toute la bonne volonté que les Défendeurs, plaidant comme ils l'ont fait, semblent solliciter, il m'est impossible de voir

cumulation d'actions dans une demande qui me paraît être fort simple, et formulée dans une *déclaration* on ne peut plus logique. La doctrine qu'en pareil cas, la responsabilité de de l'architecte et de l'ouvrier entrepreneur est solidaire, a déjà été consacrée dans la cause de *Brown* vs. *Laurie*, et à moins que les Défendeurs actuels, n'approuvant pas la décision, n'aient eu l'espérance qu'aujourd'hui les tribunaux pourraient abandonner une doctrine aussi salutaire, il me semble que leur exception de cumulation a été faite en pure perte. Au mérite, c'est-à-dire sur le fond de la demande, c'était une cause à référer à des experts ; et le juge qui a ordonné l'expertise a très bien fait dans l'état de la procédure. Le Demandeur à qui il était permis de nommer un expert, a néanmoins refusé de le faire. Il a fait plus, il s'est abstenu de prendre aucune part aux procédés des experts nommés par la cour et les autres parties. Si c'est encore dans des vues d'économie, il est certainement le seul à blâmer. Le rapport des experts ne lui accorde que la somme pour laquelle le jugement final a été rendu, savoir £51 1s. 8¾d. Et je suis d'opinion qu'il n'y a rien à trouver à redire contre le jugement. Le Demandeur ne pouvait s'attendre à obtenir une condamnation pour tout ce qu'il demandait, la rejection des travaux a été au-delà de ce qui avait fait l'objet de l'acte du 15 septembre 1856, et et on y a employé du bois bien plus coûteux que celui que les Défendeurs charpentiers devaient employer aux termes du susdit acte. On a fait des embellissements qui ont pu donner plus de prix à la location des magasins. On paraît avoir fait enfin ce que les premiers plans et devis des Défendeurs architectes, plans et devis non acceptés dans le temps par le Demandeur, avaient originairement proposé de faire. Mais ce n'est pas une raison de rejeter sur les Défendeurs ce surcroît de dépenses, faites uniquement au profit du Demandeur. Sur le tout, je suis d'opinion de confirmer purement et simplement du tribunal de première instance, et, par conséquent, de renvoyer tous les appels.

MEREDITH, J., concurred in the judgment of the court, but thought that David ought to have been allowed the $94.05 which he had proved he had expended in indemnifying his tenant Hill for expenses actually incurred by the latter in removing from the premises while the repairs were being made and in returning thereto. He could not see upon what principle this amount could be disallowed, as it was plainly not involved in the reference to the *experts*, and was in fact so much special damage in addition to that established by their report.

DUVAL, Justice, held there was no cumulation. The questions of fact were disposed of by the report of the *experts*

named under the order of the court which was an unanimous report. The sum mentioned in the report and judgment, was the sum which would have made the floors secure and prevented the sinking. The Plaintiff wished however to make his stores what they would have been, had he accepted the first plans of the architects and not cut them down. He thought that Plaintiff would suffer now from his own fault in restricting the expenditure too much.

MEREDITH, Justice: I agree with the Chief-Justice, and M. Justice Duval, in the opinion that no sufficient cause has been shown for disturbing the judgment of the Superior Court, in so far as it is based upon the report of the *experts;* that report being in my opinion justified by the evidence. I, however, am of opinion, as we hold the architects and contractors liable for the repairs rendered necessary in consequence of the want of solidity in the work in question, that we ought also to hold them liable for the sum of $94.05, paid by David to Hill, in consequence of his removal from the premises whilst the repairs were being made. I think the two claims are to be determined by the same principles; and that, if Plaintiff is entitled to indemnity for the costs of the repairs, is also entitled to indemnity for the allowance he had to make to his tenants for the interference with their occupation, whilst the repairs were being made. This opinion, however, is not concurred in by any of the other judges; and as I could not expect it to prevail, even if there were a rehearing, I think it right to waive it, in order that there may be a judgment. There is one other point in the case to which I desire to allude; it is the objection to the joinder of the contractors and architects in the same action, which was much relied on by the learned counsel for the contractors. This objection does not seem to me well founded. The contractors and architects, by their negligence, or want of skill, with respect to a work in which they were jointly engaged for Plaintiff, have subjected him to damages; and, as they were jointly concerned in that work, which we by our own judgment condemn, I think it right that they should be called upon jointly to answer it. Had Plaintiff sued them separately, each would have had an opportunity of throwing the blame upon the other, that is upon the party absent; whereas, by means of the suit against them jointly, the matter has been investigated in the presence of all the parties interested. This view is borne out by the practice which appears to have obtained in France, as well before, as since, the passing of the Code Civil. In the well known and important case which is to be found in the 3 Nouveau Denisart, vbo Bâtiment, p. 312, the architects and builders were sued together. The same course was followed in a

case in which judgment was rendered by the Court of Cassation, on the 20th November, 1817, and which is to be found in the 14th vol. of the *Journal du Palais*, p. 503; also in another case decided by the *Cour de Cassation*, on the 12th November, 1846, to be found in the vol. of Dev. and Car. for 1845, part. 1, p. 149; and, lastly, in two cases decided in the *Cour royale de Paris*, the one on the 17th February, 1853, and reported in the *Journal du Palais*, for 1853, p. 279; and the other, as late as the 20th June, 1857, vol. 68, *Journal du Palais*, p. 947. In each of these cases, as I have already observed, the architect and contractor or builder were sued jointly. In some of the cases the demand of the Plaintiff was maintained in whole or in part. In others it was rejected, but it does not, I believe, appear to have been contended, at any stage of the proceedings by the counsel either for the contractor, or for the architect, or to have been thought by any of the courts, that there was any irregularity in joining the architects and contractors in one suit. Believing then, as I do, that the form of the proceedings adopted by Plaintiff in the court below, is right in principle, and is justified by practice, I have no hesitation in overruling the objection urged by the contractor and the architects, that they have been, as they say, improperly joined in the same action. At the same time, I do not wish to be understood as holding that an architect in charge is, in all cases, liable for the bad work done by the builders, or that all the contractors engaged about a building are liable for defects resulting from the bad plans of the architect. In the case before us, as I view it, all the Defendants are chargeable with negligence, or want of skill, with respect to the work in question; and, therefore, without going beyond the present case, I hold they were all rightly condemned. Judgment confirmed. (14 *D. T. B. C.*, p. 31, et 8 *J.*, p. 44.)

McKay and Austin, for McDonald.

Bethume for David.

A. et W. Robertson, for Hopkins et al.

PREUVE.

Superior Court, Montreal, 29 September, 1860.

Before Monk, Justice.

Wheeler *et al. vs.* Burkitt *et al.*

Jugé: Dans une action contre une femme mariée alléguée être séparée de biens, que la production d'actes notariés dans lesquels la Défenderesse s'était qualifiée de femme séparée de biens d'avec son mari, n'est pas preuve suffisante de telle séparation, si la séparation est niée par le plaidoyer.

This was an action against a married woman alleged to be separated as to property from her husband. The plea denied such separation, and the evidence, in relation to this point, consisted of interrogatories *sur faits et articles* put to Defendants, who denied the separation, and of certain notarial deeds produced at *enquête* by Plaintiffs, in which Defendant took the quality of *femme séparée de biens*. This proof was held insufficient and the action dismissed.

JUGEMENT: "Considering, that it is not proved that Sarah "Burkitt was at the time of the institution of this action, or "at any previous time, separated from her husband, the Court "doth dismiss Plaintiff's action." (11 *D. T. B. C.*, p. 118.)

JUDAH, for Plaintiffs.

MONK, for Defendants.

CAUSE OF OBLIGATION.—SECURITY.

SUPERIOR COURT, Montreal, 30th March, 1861.

Coram BERTHELOT, J..

PERRY *vs.* MILNE.

Held: 1. That a promissory note, made as an indemnity for assuming liability for a third party at the request of the maker, is valid as such indemnity.

2. That the party indemnified may sue as soon as troubled, and before paying the debt for which he has become liable. (1)

Plaintiff had been pursued, in the Superior Court, in the district of Quebec, upon an appeal bond, executed by him and one Finney, in an action in which Charles Deprès was Plaintiff, and Matilda Martin, Plaintiff *par reprise d'instance*, and James Rigney and James Moir Ferres were Defendants. The appeal not having been prosecuted, judgment was rendered against Defendants. Thereupon Plaintiff *par reprise*, instituted a suit against Perry and Finney, claiming £1800 and interest, the amount of the Bond. Perry defended the action, and judgment was given against him during the pendency of the present action. Perry held a promissory note for £2250, granted by Milne, Defendant in the present action, as an indemnity to him for becoming such surety in appeal. Upon this note, an action was brought by Perry, whereby he alleges the facts, and asked the court to condemn Milne to pay the amount of the note, or otherwise to indemnify him from the suit, at the instance of Martin. Defendant pleaded that he had granted the note, but that Plaintiff had paid nothing to Martin, and, there-

(1) V. art. 982, 989 et 1941 C. C.

fore, was not entitled to his present action, and that the note was without consideration.

"La cour, considérant qu'il y a preuve que le billet du premier juillet 1854, a été consenti par le Défendeur au Demandeur, pour le garantir et indemniser, au cas qu'il serait recherché ou poursuivi par suite du cautionnement que le Demandeur a souscrit et consenti, conjointement et solidairement, avec Thomas Finney, le vingt-cinq de juillet 1854, à Québec, devant l'honorable René-Édouard Caron, pour la somme de £1850, en faveur et au profit de Mathilda Martin, ès qualité, et que, de plus, cette dernière a poursuivi le Demandeur et Thomas Finney, sur et en vertu du dit cautionnement, par action rapportée devant la Cour Supérieure, à Québec le trente-et-unième jour de mai 1858; laquelle action a été suivie d'une condamnation conjointe et solidaire contre le Demandeur et Finney, par jugement de la Cour Supérieure, à Québec, en date du quatre juillet 1860, en faveur de Mathilda Martin, ès qualité, pour la somme de £1850, avec intérêt depuis le huit mai 1858, a condamné et condamne le Défendeur à acquitter, garantir et indemniser le Demandeur, tant en principal qu'intérêt du jugement ainsi rendu contre lui le quatre juillet 1860, en faveur de Mathilda Martin, et qu'à défaut, par le Défendeur de rapporter et exhiber au Demandeur, sous quinze jours à compter de la signification du présent jugement, une quittance et décharge suffisante et légale du jugement du quatre juillet 1860, il soit, après tel delai, procédé contre le Défendeur à l'exécution du présent jugement, pour le montant en capital et intérêt du jugement du quatre juillet, et particulièrement pour la somme de £1850, avec intérèt depuis le huit mai 1858, et les frais de la présente action. (5 *J.*, p. 121.)

TORRANCE and MORRIS, for Plaintiff.

*M*CKAY and AUSTIN, for Defendant.

CAPIAS AD RESPONDENDUM AFTER JUDGMENT.

SUPERIOR COURT, Montreal, 30th March, 1864.

Coram LORANGER, J.

PERRY *vs.* MILNE.

Held : That a capias ad respondendum may issue on a judgment of this court. (1)

That such a writ is valid although it be issued in a new action, a writ *introductif d'instance*. That it is competent to a Defendant on the merits of the cause, after fyling a plea to the merits, to disprove the allegations of the affidavit upon which the *capias* has issued. (2)

(1) V. art. 802 C. P. C.

(2) V. art. 819 C. P. C.

The Plaintiff, on the 23rd March, 1863, sued out a writ of *capias ad respondendum*, under which Defendant was arrested and gave bail to the sheriff. The declaration fyled by Plaintiff alleged a judgment of this court for a sum of £1850, besides interest, rendered in this court on the 30th day of March, 1861, and reported *supra* p. 92, against Defendant in favor of Plaintiff as the cause of indebtedness: it further recited the allegations of the affidavit upon which the *capias* issued, and concluded as follows: "Wherefore Plaintiff brings suit and prays that a writ of *capias ad respondendum* or attachment may forthwith issued against the body of Defendant, to compel Defendant to appear before this court on the 6th of April next, to hear said attachment declared good and valid, and to answer the premises, and that said attachment may be declared good and valid, and, thereupon, that Defendant may be adjudged and condemned to pay and satisfy to Plaintiff said sum of £1850 and £527 9s making together the sum of £2377 9s. currency, with the interest on the said sum of £1850 from the 19th March instant until paid, and costs of suit: "The Defendant, on the return of the writ, presented his petition for his liberation, under the provisions of the *capias* Act. Evidence was taken in the usual way on this petition, and after, an argument in chamber, before Mr. Justice MONK, the petition was rejected on the 27th May, 1863. The Defendant, subsequently, on the 15th June, 1863, fyled three pleas to the Plaintiff's action. By the first plea, he, in substance, averred that the allegations of Plaintiff's affidavit were untrue, and that, by law, no writ of *capias* could legally issue. By a second plea Defendant said: "That all "the allegations, matters and things set forth in the declara- "tion, or so far as they recite and rely upon the allegations "in the affidavit therein mentioned, contained are untrue; "that, moreover, Plaintiff cannot by law bring a second action "in the same court, to obtain a second condemnation against "Defendant, as prayed for as and by said declaration, and "such action, is wholly illegal and unfounded; that, moreover, "Plaintiff hath not paid the debt for which he became secu- "rity, nor any part thereof, and that no judgment can or "ought to be rendered against Defendant absolutely, and that "the action, resting as it does upon the allegations of said af- "fidavit, and upon alleged fraud on the part of Defendant, "Plaintiff cannot obtain any judgment against him, the alle- "gation being untrue." The third plea was a *défense en fait.*

LORANGER, J.: This is a *capias ad respondendum* after a judgment primarily obtained by Plaintiff against Defendant; the conclusions of declaration praying for a new condemnation. There are two issues substantially raised, one in law

denying the right of Plaintiff to issue a *capias ad respondendum* on a judgment and to obtain a new condemnation, and the other in fact traversing the fact alleged in the affidavit upon which the *capias* has been issued, in support of the allegation therein contained in the following words : " And " Deponent saith that he hath reason to believe, and doth " verily believe that Defendant hath secreted and is about to " secrete his property, with intend to defraud Deponent, and " is immmediately about to leave the province of Canada, with " an intend to defraud Deponent, and that such departure " will deprive Deponent of his remedy against Defendant, " whereby, without the benefit, &." By hisplea, Defendant has also denied his indebtedness, but this ground which has been implicitly abandoned at the argument is totally devoid of foundation. On the question of law, I am of opinion that, under the old maxim of the Roman law, *non bis in idem*, and the constant jurisprudence of the Courts of Justice founded upon it, Plaintiff cannot support his demand for a second condemnation, and that that part of his conclusions must be dismissed, but, on the other point, I am as certain that a writ of *capias* may be issued on a judgment. It has been contended that, if a *capias* can issue, it must be in the same cause in which the first judgment has been pronounced, and on subsequent proceedings. That looks pretty much like a distinction without a difference ; for, if Plaintiff can issue a *capias*, is it not to Defendant a matter of perfect indifference to be arrested on a writ *introductif d'instance*, or on a writ *sur une instance déjà terminée ?* The only interest on behalf of Defendant might be as to costs, but the matter has not been put in that light. I cannot then entertain Defendant's pretension in this respect. The only question is one entirely of evidence, was Plaintiff justified in issuing the *capias*, on the ground of fraudulent secreting of property or of fraudulent intent to depart from the province. I say a question of evidence, for I hold that, on a *capias*, a Defendant, on the merits of the cause, may disprove the alleged fraud against him, in other words, disprove the truth of the affidavit. That has not been denied at the argument ; and the same reasons which have induced the Court of Appeals to reform the old jurisprudence in regard to *saisie-arrêt avant jugement*, apply with a tenfold authority to the writ of *capias*, and that exclusive of the right which Defendant may have to obtain his liberation on a summary petition. My only duty was then to examine the evidence adduced by Defendant, and to say whether it is of a nature to disprove the affidavit filed by Plaintiff ; and after a long, careful and patient investigation of the same, I hold that that evidence is not only insuffi-

cient to make good the denegation of Defendant, but the contrary ; that coupled with the evidence adduced by Plaintiff in rebuttal, has sufficiently proved fraudulent intent on behalf of Defendant, and the full justification of Plaintiff in issuing the writ. The judgment must go for Plaintiff, in consequence, declaring the *capias* executory, with costs, and dismissing the rest of the action.

" The court, having heard the parties, upon the merits of this cause, considering that Plaintiff has established his allegations as to the indebtedness of Defendant to Plaintiff to the amount of £2377 9s. in virtue of a judgment obtained before this court, against Defendant, for the sum of £1850, bearing interest thereon, at the rate of six per centum per annum, from the 8th of May, 1858, and calculated to the 19th day of March, 1863, making the sum of £2377 9s. 0d., which sum is still due ; considering that Defendant has failed to disprove the truth of the affidavit fyled in support of the writ of *capias ad respondendum* as to the fraudulent intent of Defendant, in regard to the secreting of his goods and his alleged departure from this province ; considering that, notwithstanding anything to the contrary alleged by Defendant, Plaintiff had a perfect right to issue said writ of *capias ad respondendum* on the judgment above mentioned, and that said writ must be declared executory ; considering, however, that Plaintiff is not entitled to obtain a judgment pronouncing a new condemnation against Defendant, for the sum of money which, in and by said judgment Defendant has already been condemned to pay and satisfy to Plaintiff, doth dismiss that part of the conclusion of Plaintiff's demand, in regard to such condemnation ; declares the writ of *capias ad respondendum* to have been rightly issued and declares and orders the same to be executory, according to law for the recovery and satisfaction of the said sum of £2377 9s. with interest on the said sum of £1850 from the said 19th day of March, 1863. (8 *J.*, p. 222.)

TORRANCE and MORRIS, for Plaintiff.

A. and W. ROBERTSON, for Defendant.

PRIVILEGE.—VENTE.—SAISIE CONSERVATOIRE.

COUR SUPÉRIEURE, Montréal, 30 avril 1861.

Coram BADGLEY, J.

LEDUC *vs.* TOURIGNY.

Jugé: Que le droit de saisie conservatoire, en vertu de l'article 177 de la *Coutume de Paris*, n'est pas aboli par le statut, et qu'il n'est pas besoin d'affidavit pour l'exercer. (1)

Le 6 mars 1861, le Demandeur avait fait saisir avant jugement entre les mains de la Défenderesse, une certaine quantité de quarts de fleur, en vertu de l'article 177 de la *Coutume de Paris*, alléguant une vente à terme, au mari de la Défenderesse, de ces quarts de fleur; le décès en état de déconfiture du mari de la Défenderesse, et la possession par cette dernière des quarts de fleur vendus. Le Demandeur produisait un affidavit au soutien de sa demande. La Défenderesse fit motion, le 25 avril, que la saisie conservatoire fût annulée pour les raisons suivantes: 1° parce que la saisie, est véritablement une saisie arrêt simple; 2° parce que l'affidavit qui accompagne la saisie, ne fait voir aucun fait qui puisse justifier l'émanation d'un bref de saisie-arrêt, et ne rencontre pas les termes du statut; 3° parce que l'ancienne jurisprudence française qui pouvait permettre l'émanation d'un bref de saisie conservatoire, dans le but de sauver le privilège du vendeur, a été abrogée par le statut; 4° parce que, sous la législation actuelle de ce pays, il n'y a pas lieu à la voie de saisie-arrêt conservatoire, excepté dans les cas pourvus par le statut; 5° parce que le statut a eu l'intention et l'effet d'abroger toute saisie-arrêt conservatoire, dans les cas de privilège en général, que reconnaît et accorde l'ancien droit français.

BADGLEY, J.: En rendant jugement dit, que la saisie-arrêt conservatoire, en vertu de l'article 177 de la *Coutume de Paris*, n'a pas été abolie par le statut, et qu'au contraire ce droit a souvent été exercé et confirmé par les tribunaux. Que pour obtenir un bref de saisie-arrêt conservatoire, il n'est pas besoin d'affidavit, ainsi qu'il a été jugé dans la cause de *Torrance* vs. *Thomas*, 6 *R. J. R. Q.*, p. 400 et 402, et qu'ainsi il n'a pas à décider si l'affidavit en cette cause est ou n'est pas suffisant, puisqu'il n'est même pas nécessaire qu'il y en ait un. Motion renvoyée. (5 *J.*, p. 123, et 6 *J.*, p. 24.)

FABRE, LESAGE et JETTÉ, pour le Demandeur.

CARTER et GIROUARD, pour la Défenderesse.

(1) V. art. 1994, 1998, 1999 et 2000 C. C. et 834 C. P. C.

INSCRIPTION EN FAUX.—EXTRAIT DE BAPTEME.

SUPERIOR COURT, Montreal, 29th September, 1860.

Coram SMITH, J.

Dame S. C. SHAW *et vir.*, *vs.* SYKES, and SYKES, Plaintiff *en faux*, *vs.* SHAW, *et vir.*, Defendant *en faux.*

Held: 1st. That the *extrait de baptême*, copy below written, will not be set aside upon *inscription de faux*, unless falsity or incorrectness is alleged and proved.

2nd. That, though not an extract from the registers which the American Presbyterian Church was by law allowed to keep, it is not thereby a *pièce fausse.*

3rd. That the only extracts which can carry authenticity are those extracted from the registers allowed and ordained by law that the American Presbyterian Church should, keep.

4th. That, though *inscription de faux* is dismissed the *pièce* is not authentic in itself but rights as to proof of said extract will be reserved to parties.

To the petitory action of Plaintiffs, claiming, as dower accruing to female Plaintiff, a certain lot, Defendant being the *détenteur*, Defendant pleaded renunciation and relinquishment of all dower and claims made by Plaintiffs in favor of Noah Shaw, the father of S. C. Shaw, and *auteur* of Defendant, on the 21st September, 1849. The answer to this plea was that female Plaintiff was, at such date, a minor, having been born on tne 19th October, 1828. In support of their claim was fyled an *extrait de baptême*, as follows: " Noah " Alpheus and Sarah Caroline, children of Noah Shaw, car- " penter, living in the district of Montreal, and Fanny Durgin " his wife.- Noah born the first of October, 1820, and Sarah, " born the nineteenth of October, 1828, were baptised the " second of January, 1832, by " G. W. PERKINS, *Minister.*" " NOAH SHAW, FRANCES DURGIN, SALLY DURGIN, MARY ANN " PERKINS." " The above is a true extract from the register " of Baptisms of the American Presbyterian Church, Montreal, " for the year, 1832. Montreal, July 24th, 1856. " JOHN " McLOUD, *Minister of American Presbyterian Church,* " *Montreal.*" The *inscription de faux* was directed by Defendant against this certificate of Reverend John McLoud, as false and untrue in that what Reverend John McLoud certified to be a true extract from the register of baptisms of the church, for the years, 1832, was not extracted at all from the registry of baptisms of that church for that year, or, from any register for any other year, which the minister of that church for that year or any other year was authorised by law to keep. That, in fact, instead of its being extracted from any such register, it was taken from a private memorandum

book, in the possession of the Rev. Mr. Bonar, the now minister of the church, produced by him before the court, upon the motion of Defendants *en faux*, and of which a *procès-verbal* had been made by order of the court, whereby it appears that said book was not a register of baptism of said church for that year or any other year, but merely " a book covered " in morocco, not *paraphé*, nor authenticated by a judge or " prothonotary as a register of baptisms, &c." Defendants *en faux* pleaded to the inscription, setting forth the facts of the case ; explaining the certificate, that is, it was true and correct its authenticity and truth were not denied by Defendant, and unless attacked in such particulars, *inscription de faux* was unfounded.

J. J. DAY, for Plaintiff *en faux* : The minister of the church, in 1832, namely, the Rev. G. W. Perkins, was by law authorized to keep registers of baptisms, marriages and burials, under the statute 1 Wm. IV., ch. 56, which received the royal assent on the 12th April, 1832, and was signified by proclamation on the 5th June, 1832 ; but the first register ever kept by him was authenticated and delivered to him only on the 30th day of July of that year. The certificate of the Rev. John McLoud bears date July 24th, 1856. He was then minister of the church. No other interpretation could, legally, be given to this certificate than that it was a certificate of a public officer, which should make proof in itself, in our courts of justice, of the facts certified, namely, that it was a true extract from the register of baptisms of the church, for the year 1832, which the Rev. G. W. Perkins had kept and had transmitted to the Rev. Mr. McLoud, as his successor in the ministry, entitled to the custody thereof. If Defendant had not inscribed *en faux*, this certificate would be regarded by the court, in adjudging upon the merits of the principal demand, as a duly authenticated *extrait baptistaire*, namely a true extract, as it purports to be, from the register, which the minister had kept in 1832, under the sanction and authority of the law, and not from a mere memorandum or private book belonging to the minister and kept by him previously to his applying for an obtaining his register, in 1832. There is nothing, either in the certificate or in the matter of which it certifies to be the true extract, which fixes any date as the period when the entry was made by the Reverend G. W. Perkins. The certificate which bears date, Montreal, July 24th, 1856, declares it to be a true extract from the register for the year 1832, which can only mean, in the absence of any date appearing to the pretended entry of the baptisms performed by the Reverend G. W. Perkins, that there is an entry in the register of 1832, which the Rev. G. W. Perkins kept, *under the autho-*

rity of law, in that year, of a baptism which he had performed in the month of January of that year. There is nothing indicating that the entry was made before the 30th July, 1832; but, on the contrary, there is the solemn certificate of the minister of the church, as a public officer, given in 1856, that the entry of the baptism was extracted from the register of baptisms of the church for 1832, then in his custody as the minister of the church, which could mean nothing else than that the entry was to be found in the register to which the statute refers.

R. Laflamme, Esq. for Defendants en faux, submitted: La seule preuve offerte par le Défendeur constate que ce registre n'est pas un registre tenu en vertu de la loi, mais n'est au contraire qu'un registre des baptêmes faits à l'époque mentionnée par le ministre de cette Eglise. A la date du baptême mentionné dans cet extrait, les ministres de cette Eglise n'avaient aucune autorité légale de tenir des registres. Ce n'est qu'en vertu du statut 1 Will. IV, ch. 56, que cette autorité leur a été accordée. Ce statut reçut la sanction royale le 12 avril, 1852. Les registres qu'ils tenaient ou qu'ils ont pu tenir jusque-là n'ont pas le caractère de documents officiels et d'authenticité. Les copies extraites du registre avant la date du statut qui leur donne le caractère de registres officiels et authentiques, portant la date de leur entrée dans tel registre, comportent avec elles une déclaration suffisante qu'elles ne sont que des actes privés et non authentiques. Les extraits antérieurs au statut ne peuvent être que des documents privés. Personne ne peut ignorer qu'il n'existait aucun registre authentique pour cette Eglise, en 1832, jusqu'à la date de la sanction de ce statut. Il est également vrai que cette Eglise avait son régistre particulier comme congrégation religieuse. Il est prouvé que l'extrait produit et contre lequel l'inscription de faux a été prise est véritable. Le Défendeur n'en a nullement démontré la fausseté, et la Cour avait à décider, suivant les prétentions du Défendeur, 1° Sur la fausseté d'un acte privé et non authentique par voie d'inscription de faux. 2° Il demandait que la Cour déclarât faux un acte privé, sans que la vérité des énonciations qu'il contenait, fût en aucune manière attaqué.

" The Court, having heard the parties, upon the merits of the inscription *de faux*, considering that Plaintiff *en faux* hath failed to prove the material allegations of the *moyens de faux* by him fyled, against the exhibit No 4 of Defendants *en faux*, and fyled by the latter as their exhibit, in support of the principal demand, and mentioned and referred to in the *moyens de faux*; and, further, considering that the piece so inscribed *en faux* against by Plaintiff *en faux*, is not a

pièce fausse, as complained of in and by the said *moyens de faux*; and, further, considering that the said piece of extract of baptisms referred to is not an extract from the register of births, baptisms and deaths which the religious body called by the name of the American Presbyterians of the City of Montreal, never authorized by the law and statutes in such case made and provided, which alone can carry with it authenticity, yet, that it is not thereby a *pièce fausse*, as complained of by the *moyens de faux*, the court doth dismiss the *moyens de faux*, reserving to the parties their respective rights under the principal demand, as regards the proof to be hereafter made of the said extract of baptism, as to justice shall appertain. (5 *J.*, p. 124.)

LAFLAMME, LAFLAMME and DALY for Plaintiffs.

DAY and DAY for Defendant.

PROMISSORY NOTE.—ENDORSER.

SUPERIOR COURT, Montreal, 30th March, 1861.

Coram Smith, J.

BULL *vs.* CUVILLIER *et al.*

Held: That the retirement before due, of a note by a prior endorser does not discharge a subsequent endorser as against a holder for value if there was no real payment, but a mere exchange of securities with express retention of the liability of the parties to the note.

This was an action brought by H. Bull, Jr., the last endorser against Austin Cuvillier *et al.*, prior endorsers, upon a note for £4,500, dated 26th December, 1854, at Belleville, and made by Bull Brothers. The Defendant pleaded that the note was discounted at the Commercial Bank, in Belleville, by Henry Bull and Company, prior endorsers to A. Cuvillier and Co., the Defendants. That, after such discount and before it became due, Henry Bull and Co., paid and retired the note, and that, thereby, the liability of A. Cuvillier and Co., as subsequent endorser, was discharged. The Defendant also pleaded that Plaintiff was not a *bonâ fide* holder, but acquired the note after the maturity, with full knowledge of such payment. The Plaintiff answered denying the payment, and alleging that he was a *bonâ fide* holder for value, having paid the note after maturity; that Defendants had, long after the maturity of the note, addressed the Commercial Bank, the then holders of the note, a letter missive requesting the Bank to give the makers of the note an extension of time for payment, and that, thereby, any irregularity or laches had been waived and

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cured ; that Plaintiff, after the signing of such letter, retired the note, and, thereby, became subrogated in the rights of the bank. The evidence established, that the note had, in fact, been discounted in the Commercial Bank, by Henry Bull and Co., but that that firm was indebted to the bank in a much larger sum for which security was given to the bank, and thereupon a draft was drawn upon the Kingston office to cover this indebtedness, the note in question, with others, being however contemporaneously deposited with the bank, as collateral security for the debt, the bank expressly reserving to hold the parties to the paper. The former manager of the bank, at Belleville, R. Finlay, testified that the transaction of the draft and the retention of the note was one transaction. It was also proved that, after maturity, the note was placed in the sollicitor's hand for collection, The letter missive whereby the endorsers agreed to the bank giving delay to the makers was then given, and, long afterwards, Plaintiff was obliged by the bank to retire the note, which was then delivered to him. Judgment was given in favor of Plaintiff, the court holding that there had been no real payment of the note, and that, moreover, Defendants were bound by their own letter missive, which had been signed by them long after the pretended payment, and when they must be presumed to have had knowledge of the circumstances. (5 *J.*, p. 127.)

TORRANCE and MORRIS for Plaintiff.

ABBOTT and DORMAN for Defendant.

INSCRIPTION AT ENQUETE.

SUPERIOR COURT, Montreal, 18th March, 1861.

Coram SMITH, J.

WHITNEY *vs.* BADEAUX and DUTRISAC, *et al.*, Garnishees.

Held : 1st That inscription for enquête, on plea of Defendant to *saisie-arrêt* after judgment, for the 5th of March, made on the 1st. of March, does not allow sufficient delay.

2nd That notice of such inscription is necessary.

3rd That, under the circumstances, such inscription and all proceedings had thereunder will be set aside with costs, on motion made by Defendant, in term, to that effect. (1)

After issue completed, Plaintiff, on 1st of March, inscribed at enquête, for proof on 5th inst. The inscription was served without any notice of inscription to opposite party ; on 5th March, on application of Plaintiff's attorneys, the enquête of

(1) V. art. 235 et 615 C. P. C.

Defendant was closed, as not proceeding. The same day, Defendant gave notice of motion to set aside said inscription, and all proceedings as irregular. Motion granted by the court, in term, on the eighteenth day of March. (5 *J.*, p. 128.)

GARAULT and RIVARD for Plaintiff.

LAFLAMME, LAFLAMME and DALY for Defendant.

ASSIGNATION.—DOUAIRE COUTUMIER.—FRAUDE.

COUR SUPÉRIEURE, Montréal, 31 décembre 1860.

Coram BERTHELOT, J.

FILION *et al.*, *vs.* DE BEAUJEU.

Jugé: 1. Que le mode d'assigner un Défendeur en lui signifiant copie dubref de sommation n'est pas requis à PEINE de nullité; que l'assignation sera considérée suffisante s'il est prouvé que l'original du bref de sommation a été laissé au Défendeur au lieu de la copie.

2. Que dans l'espèce, trois des Demandeurs ayant fait acte d'héritiers de leur père, leur renonciation subséquente sera annulée, et ils ne pourront réclamer leur part du douaire coutumier créé par leur père.

3. Que l'insolvabilité du mari au jour des épousailles, n'empêche pas les immeubles qu'il possédait alors de devenir sujets au douaire coutumier. (1)

4. Que le douairedes enfants d'un second mariage ne doit consister que dans le *quart* des immeubles acquis pendant la première communauté, quoique par l'effet du partage de la prémière communauté fait après le second mariage, le mari soit devenu propriétaire de la totalité de l'immeuble grevé du douaire; que, dans ce cas, le partage n'aura pas un effet rétroactif, de manière à changer la quotité du douaire. (2)

5. Que l'article 279 de la coutume de Paris, ne s'applique pas au douaire coutumier d'une seconde femme et des enfants d'un second mariage.

6. Qu'une réunion au domaine ou retrocession *volontaire* faite pour cause d'inexécution des clauses du contrat de concession originaire, n'a pas l'effet de purger l'immeuble ainsi réuni au domaine, ou retrocédé, du douaire coutumier dont il était grevé.

7. Que les charges annuelles municipales et autres sont des charges de la jouissance et possession de l'immeuble, et que le détenteur ne peut demander le remboursement des arrérages qu'il en a payés et qui se sont accrus pendant sa jouissance.

8. Que le Défendeur ayant contesté le droit d'action des Demandeurs il doit être condamné aux frais.

BERTHELOT, J.: Les Demandeurs poursuivent au pétitoire, pour le douaire coutumier créé par Antoine Filion leur père, lors de son second mariage, sans contrat le 6 de novembre 1817, avec feue Françoise Legault sa seconde femme.

M. Filion père est décédé le ou vers le premier de novembre 1848 et son épouse Françoise Legault le 27 août 1855, laissant quatre enfants nés de ce mariage, savoir: François Honoré

(1) V. art. 1434 C. C.

(2) V. art. 1436, C. C.

Filion, Françoise Julie Filion, Edouard Narcisse Filion et Anne Elmire Filion. Ils allèguent qu'ils n'ont jamais appréhendé et ne se sont jamais immiscés dans les successions de leurs père et mère, et qu'ils y ont renoncé, pour s'en tenir au dit douaire coutumier, suivant acte de renonciation reçu le 26 octobre, 1858, devant C. F. Papineau et confrère notaires, insinué le même jour; que, lors de son mariage avec Marie Françoise Legault, Antoine Filion était propriétaire, possesseur et détenteur de trois immeubles désignés en leur déclaration, No 1, 2, et 3. lesquels sont, en conséquence, devenus affectés et sujets en faveur des enfants nés de ce mariage, au douaire coutumier, suivant les dispositions de la coutume de Paris, le mariage ayant eu lieu sans contrat. Les Demandeurs concluent à ce que ces trois immeubles soient déclarés affectés au douaire coutumier, et à être déclarés propriétaires de la moitié indivise des dit immeubles, et le Défendeur condamné à leur en abondonner la possession, avec fruits et revenus. Le Défendeur a d'abord plaidé une exception à la forme par laquelle il conclut à ce que le bref d'assignation soit déclaré nul, aussi bien que la signification d'icelui qui en a été faite par l'huissier Viger. Toute la difficulté soulevée par cette exception préliminaire se réduit à ceci. Le 28 octobre 1858, l'huissier Viger, en signifiant personnellement au Défendeur, lui a laissé copie de la déclaration, avec l'original du writ y annexé, au lieu de la copie, qu'il a gardée par erreur par devers lui, et sur laquelle il a fait son retour en date du 28 octobre 1858, annexé à l'original de la déclaration et produit le 30 novembre 1858. Les Demandeurs ont, en outre, obtenu du protonotaire un *duplicata* du writ, fait à la date du 19 novembre 1858, annexé à la déclaration, et au dos duquel se trouve un second retour de l'huissier certifiant qu'il a signifié de vraies copies du writ et de la déclaration personnellement au Défendeur, le 28 octobre 1858. Le Défendeur, lors de l'enquête, fut interrogé sur faits et articles, à l'effet de déclarer s'il lui avait été signifié le 28 octobre, 1858, une copie de la déclaration, avec un writ semblable au *duplicata* y annexé ; s'il les avait en sa possession, de les produire, et s'il ne les avait pas en sa possession, de déclarer ce qu'il en avait fait. Il a répondu qu'il ne pouvait dire si le writ qu'il avait revu était semblable au duplicata, qu'il n'avait pas en sa possession la copie de la déclaration et le bref qui lui avait été signifié, et qu'il ne pouvait les produire, enfin qu'il croyait les avoir remis à son procureur M. Laflamme. Les réponses évasives du Défendeur doivent être interprétées contre lui. Et il est évident qu'il pouvait comparer le writ qui lui a été signifié avec le *duplicata* annexé à la déclaration, et qu'il pouvait même le produire facilement, puisqu'il l'avait remis à son procureur. C'est en vain que le Défendeur a pré-

tendu qu'il ne pouvait y avoir de signification légale sans qu'une copie du writ certifiée comme telle lui eût été signifiée. Bien que le mode de donner connaissance au Défendeur du writ émané contre lui et de la déclaration ou demande y annexée soit par la signification d'une vraie copie d'icelui, il n'y a aucune loi qui le commande, *à peine de nullité*, et, certainement, le Défendeur ne peut se plaindre, s'il a été assigné à répondre à la demande en lui laissant l'original même du writ de sommation ; le mode d'assignation n'en était que plus solennel. Dans l'espèce actuelle, si le Défendeur eut été appelé à répondre *viva voce* aux interrogatoires sur faits et articles, le juge lui aurait probablement, de son autorité, proposé d'autres questions qui auraient eu l'effet de faire produire le writ qu'il a reçu, et la comparaison aurait pu en être faite avec le *duplicata* et la copie annexée à la déclaration, de manière à lever tout doute, que l'original lui a été signifié le 28 octobre 1858. Mais, indépendamment de cela, la preuve formelle et directe de la signification de l'original et les présomptions à déduire des réponses évasives du Défendeur sont suffisantes pour faire rejeter l'exception péremptoire à la forme. Au mérite, le Défendeur a plaidé huit exceptions péremptoires. Par la première, il prétend que le Demandeur, Edouard Narcisse Filion, absent, n'existe pas : que les procédés qui ont eu lieu pour faire nommer François Sauvé son curateur sont nuls, et que la demande doit être déboutée quant à lui. Le Défendeur n'ayant fait aucune preuve pour soutenir cette exception, il suffit d'y répondre en disant qu'elle n'est pas prouvée ; d'ailleurs la nomination du curateur doit avoir tout son effet jusqu'à preuve du contraire, et jusque là, il faut présumer et croire à l'existence de ce Demandeur, et cette exception doit être renvoyée. Par la seconde, le Défendeur prétend que les Demandeurs ont appréhendé la succession de leur père, qu'ils sont restés en possession de tous les effets mobiliers et animaux lui appartenant : n'ont point fait d'inventaire, et que leur renonciation du 26 octobre, 1858, est nulle et de nul effet, et il en demande la nullité. La preuve testimoniale du Défendeur, sur ce point, démontre que, depuis la mort de M. Filion (1er novembre 1848), jusqu'à mars 1849, pendant plus de quatre mois, que Julie Filion et Narcisse Filion, deux des Demandeurs sont restés dans la maison du défunt avec leur mère, et que, vers mars 1849, ils y furent rejoints par les Demandeurs, Sauvé et sa femme, Anne Elmire Filion, avec qui ils continuèrent d'y rester pendant à-peu-près huit jours, durant lesquels, ils disposèrent d'une manière ou d'autre du peu de mobilier ou ménage qui était dans la maison paternelle, en le *vendant, donnant* ou *emportant*, sans qu'ils paraissent avoir fait faire aucun inventaire ou procès-verbal

ou acte quelconque pour constater à quel titre ils entendaient disposer ou garder ces effets. Il est vrai qu'il paraît que quelques-uns de ces effets appartenaient à un vieux serviteur de la famille nommé Mathias Lauzon, mais il y en avait beaucoup d'autres qui étaient certainement la propriété du défunt, tels que les lits, les tables, armoires, couteaux, un demi-minot et un diamant à couper le verre, lesquels formaient véritablement le petit ménage du défunt et sont tous restés en la possession des dits Demandeurs qui se les ont réellement appropriés. Sur l'interprétation à donner aux actes d'héritiers en pareille circonstance, je réfèrerai aux autorités suivantes : Lebrun, *Successions*, livre 3, ch. 8, sec. 2, n° 6. Où il parle d'actes qui ne comportent point addition d'hérédité. " En " dernier lieu, l'on a égard à la protection que l'on doit à la " personne et aux biens de ses proches ; c'est pourquoi la loi " ci-dessus citée, décide, que, quand, au besoin, l'on prend en sa " garde quelque chose de la succession du défunt, l'on n'est pas " présumé faire acte d'héritier." Mais au n° 8, il dit : " un fils " qui établit son domicile dans une des maisons de son père, " est *présumé* faire acte d'héritier, s'il ne justifie qu'il a fait " cela, pour quelque raison." (Autre chose serait d'une demeure accidentelle pendant le temps de délibérer.) Dans notre espèce, c'est tout au contraire, la résidence de ces Demandeurs n'a pas été accidentelle, après être restés pendant plus de quatre mois dans la maison paternelle, ils ont disposé de tout ce qui y était ou l'ont pris et emporté avec eux, et ce sans faire aucun inventaire ou acte quelconque pour qualifier leur possession. Lebrun cite aussi l'arrêt du 26 mai 1674, rapporté au 1er vol. du *Journal du Palais*, p. 569, et sur lequel les Demandeurs se reposent pour prétendre que les actes qui leur sont imputés ne peuvent les faire réputer héritiers ; mais cet arrêt est pour un tout autre cas, celui d'une femme commune, qui, après le décès de son mari, avait pris les clefs du défunt et avait aussi pris soin des titres et papiers, *avant d'avoir fait inventaire ;* en effet, ce n'était là qu'un acte conservatoire, et de la classe de ceux qui ne peuvent jamais compromettre la qualité de l'héritier. A la page 571 : sur l'interprétation des actes de l'héritier, s'ils sont sensés faits *animo hæredis* ou *non animo hæredis*, l'arrêtiste ajoute : " mais " c'est à l'héritier à prouver qu'il ne les pas faits *animo hæredis*, soit par des déclarations et protestations, autrement, il " est présumé les avoir faits *avec un esprit d'héritier*. Nous " en avons la preuve dans la loi citée qui dit que, quand un " fils, après la mort de son père, a demeuré dans la maison " paternelle, c'est à lui à prouver qu'il n'y a pas demeuré " comme héritier, mais comme légataire ou comme gardien." *Aut ex aliâ justâ ratione ;* et l'on désire pour cela une preuve

claire et évidente, autrement la présomption est contre le fils, qu'il y a demeuré en qualité d'héritier. Dans la cause actuelle je ne vois rien de la part des trois susdits Demandeurs pour me porter à croire qu'ils n'ont entendu agir que comme gardiens des effets de la succession de leur père ; et, tout au contraire, ils me paraissent, d'après la preuve, avoir agi en mars 1849, quatre mois après le décès de leur père et beau-père, comme des héritiers peuvent et pouvaient faire. Leurs actes d'alors doivent être plus forts et en disent plus que leurs déclarations et protestations faites 10 ans après, et, au moment même de répudier la succession de leur père, pour réclamer le douaire contre *un* tiers qui était au moment d'acquérir la prescription. Sur ce point, je puis encore citer page 572 du même arrêt : " De quelle manière peut-on juger de la volonté autrement que " par les actions à cause de la difficulté presque toujours " insurmontable de connaître le fond et la vérité de l'intention " des hommes ? De là vient que nos législateurs français sans " s'arrêter aux subtilités des anciens jurisconsultes, ont donné " moins de liberté aux déclarations des héritiers présomptifs, " et ont voulu que leurs actions seules parlassent pour eux." " En effet les actions sont des témoignages sincères et im- " muables, au lieu que les déclarations de la volonté s'accom- " modent à la conjoncture des temps et à la nécessité présente " des affaires." C'est à quoi je m'arrête et je regarde la renonnonciation faite par les trois Demandeurs, quelques jours seulement avant l'action, comme ayant été faite uniquement dans la vue de réclamer le douaire, alors qu'ils avaient, près de 10 ans auparavant, pris tout ce qu'ils avaient trouvé appartenant à leur père. S'il est difficile de prouver des actes d'immixtion d'hérédité et d'imputer à des héritiers comme les compromettant, des actes qu'ils n'ont pu faire que comme actes conservatoires, l'on doit être moins moins difficile. lorsqu'ils attendent au dernier moment pour repousser la succession de leur père. *Cette 2e exception devra donc être maintenue* à l'effet de renvoyer l'action, quant aux Demandeurs Narcisse Filion, Françoise Julie Filion, Alexandre Sauvé et Anne Elmire Filion, son épouse. Par la troisième exception, le Défendeur prétendait que M. Filion était insolvable au jour de son mariage, et endetté en des sommes beaucoup plus considérables que la valeur des propriétés sur lesquelles les Demandeurs réclamaient le douaire, et qu'il n'avait pu, par conséquent, les charger d'aucun douaire. Les Demandeurs ont répondu en droit que l'insolvabilité du mari, au temps des épousailles, n'avait pu l'empêcher de charger les immeubles qu'il possédait alors du douaire coutumier. Sur audition en droit la cour a renvoyé cette exception, par jugement du 24 octobre 1860. " Un acquet, dont le prix a été payé par la

" communauté ne cesse pas d'être sujet au douaire coutumier." Voir sur ce point le Jugement (rapporté au 2nd vol. *R. J. R. Q.*, p. 232, Martigny, Archambault et Lionais. Par sa quatrième exception, le Défendeur allègue que les trois immeubles sur lesquels le douaire est réclamé étaient des conquêtes de la première communauté qui avait existée entre Filion et Adélaïde Antoinette De Beaujeu, depuis le 29 septembre 1800, jour de leur mariage, jusqu'au 9 de juillet 1813, jour du décès de cette dernière, durant lequel mariage trois enfants sont nés qui ont survécu à leur mère, et que, par loi, Filion ne pouvait charger d'aucun douaire en faveur de sa seconde femme, ou des enfants qui naîtraient de ce second mariage, les conquêts par lui faits durant sa première communauté, parce qu'une moitié de ces immeubles appartenait aux enfants de son premier mariage, et que l'autre moitié étant un conquêt de sa première communauté, il était tenu de les réserver aux enfants nés de son premier mariage. Les Demandeurs ont répondu à cette exception que Filion avait fait procéder à l'inventaire des biens de sa première communauté, en juin 1816, devant Maillou, notaire ; et qu'il avait été clos le 3 Septembre de la même année ; que Génevieve Luce Filion, une des trois enfants du premier mariage, était décédée en minorité, en 1822 ; que, par acte de compte et partage de sa première communauté, en date du 24 novembre, 1823, devant Barron, notaire, Antoine Filion et Antoine Amédée Filion et Catherine Adelaïde Filion, ses deux enfants survivants de son premier mariage avec Dlle De Beaujeu, avaient réglé la première communauté, et que les dits deux enfants survivants avaient vendu et cédé, par le même acte, à leur père, tous leurs droits successifs, mobiliers et immobiliers dans les immeubles de cette première communauté, consistant en la moitié indivise de tous les conquêts d'icelle, entre autres des trois immeubles désignés en la déclaration ; et acquis le premier, le 3 novembre 1800 ; le second, le 6 mai, 1809 ; le troisième, le 15 mars 1808 ; que cette vente de droits successifs équipollait à partage, et que, par conséquent, feu Antoine Filion devait être considéré comme propriétaire pour la totalité, du moment de l'acquisition qu'il en avait faite, et plus particulièrement au temps de son second mariage : d'après cet exposé, l'on voit que la prétention du Défendeur consiste à dire que l'article 279 de la coutume de Paris, qui prohibe ou limite les avantages entre conjoints passant à de secondes noces, doit s'appliquer au douaire d'une seconde femme et des enfants d'un second mariage, de manière que tel douaire ne pourrait se prendre sur la moitié des conquêts d'une première communauté, au préjudice de la part des enfants d'un premier mariage. pour leurs parts héréditaires dans la succession du père quant à ces conquêts : en d'autres mots, que la réserve

coutumière de l'article ci-dessus cité, et de l'Edit de François II touchant les secondes noces, devrait s'appliquer pleinement au douaire d'une seconde femme. Bourjon, tome 1, Douaire, sec. 6, Distinction seconde sur les articles 253 et 279, soutient cette opinion, mais il est refuté, comme on le verra ci-après. Le Maître semble dire la même chose en son commentaire sur l'article 279, mais ce n'est pas très clair. Le contraire me paraît être conforme à l'article 253 de la coutume, et avoir été la jurisprudence suivie en France sur ce sujet. Sur ce, je réfère au Répertoire de Guyot, vol. 6, Douaire, p. 287 ; après avoir cité l'article 279, il dit ; " Les auteurs décident que le douaire " ne pouvant *augmenter* ou *diminuer*, la femme est obligée " de s'en tenir à la fixation qu'elle a eue par la coutume, lors " du mariage, sans que, par aucun *événement*, il puisse être " changé ou modifié. Il y a plus, on décide que lors même " qu'il y a eu exclusion de douaire par le premier contrat de " mariage, le douaire coutumier de la seconde femme n'en " devient pas meilleur que ne le donne la coutume, lorsqu'au " temps du second mariage il se trouve des enfants du premier." Il en doit être ainsi, parce que les avantages de la femme et des enfants à naître du mariage doivent être irrévocablement fixés au jour du mariage, sans pouvoir aucunement être augmentés ou diminués depuis, car, s'il pouvait en être autrement, *cela* pourrait donner lieu à des avantages indirects prohibés par la loi. Au bas de la page 287 de Guyot est la note suivante : " Bourjon a prétendu que le douaire accordé à la seconde " femme, sur la moitié des conquêts revenant au mari, ne pou- " vait avoir lieu au préjudice des portions qu'y doivent avoir " les enfants du premier mariage relativement aux dispositions " de l'article 279 de la même coutume, mais c'est par une erreur " palpable justement relevée par M. Pothier. L'article 279 qui " oblige la femme qui se remarie de conserver les conquêts aux " enfants du premier mariage est pour un cas tout différent ; " finalement, le douaire est moins une libéralité qu'une dette " dont la coutume charge les biens du mari, elle le tient de la " loi et ne le tient pas de son mari." Pothier, Douaire, n° 46. Denisart, Douaire, sec. 7, p. 194. " Pour quelle portion la femme " et les enfants ont-ils droits de jouir des héritages sujets au " douaire coutumier, dans les seconds et ultérieurs mariages ?" " Cette portion est la même que si c'était un premier mariage " à l'exception de la portion à prendre dans les objets sujets à " un premier douaire." P. 195. Sur l'article 253. Parlant des choses sujettes au second douaire il dit : " Ce qui outre les ob- " jets détaillés dans l'article, comprend encore les immeubles " échus par succession depuis la dissolution du premier ma- " riage, jusqu'à la célébration du second, et aussi les immeubles " échus en collatérale pendant le premier mariage, qui ne sont

" sujets au douaire que lorsque le père les possède au *moment* " du second mariage." D'après ces différentes autorités, il faut venir à la conclusion que le douaire de la seconde femme doit en se prendre sur la moitié des conquêts de la première communauté, sans que l'article 279 puisse le diminuer. Reste la question de savoir si ce que Mr. Filion a acquis de ses deux enfants du premier mariage, par le compte et partage de la premièrecommunauté du 24 novembre 1823 doit être sujet au douaire de la seconde femme. D'après les autorités ci-dessus qui font voir que le douaire ne doit se prendre que sur les héritages que le mari tient et possède au jour du mariage et aux termes de l'article 253 qui ne doit pas recevoir d'extension, il faut en venir à la conclusion qu'ils n'y sont pas sujets. S'ils pouvaient l'être, il serait au pouvoir du père de grossir le douaire des enfants de son second mariage ou de tout autre mariage subséquent, en dirigeant et faisant tourner les opérations d'un partage, de manière à faire passer à son lot les conquêts de la première communauté, de même qu'il pourrait le diminuer en faisant passer au lot de ses enfants du premier lit sa part des conquêts de la première communauté, ce qui serait tout à fait contraire à l'esprit de notre droit qui prohibe tout avantage même indirectement après le mariage. Les Demandeurs ont pretendu que le partage de 1823 avait eu un effet rétroactif, de manière à faire prendre à ces parts indivises acquises par Filion père de ses deux enfants, le caractère de conquêts faits par lui, dès le jour de l'acquisition par lui faite durant sa première communauté ; je ne pense pas qu'il puisse en être ainsi d'après la manière dont ce partage a été fait. Cet acte n'a le caractère de partage que quant à ce qui a rapport au mobilier de la première communauté ; lorsque les parties au partage en sont venues à disposer des immeubles, ils paraissent en avoir fait une véritable vente. Il aurait également été possible à Filion père, de vendre à ses enfants du premier lit, ses parts des conquêts de la première communauté, et que serait alors devenu le douaire des enfants de la seconde femme dans le système des Demandeurs. Le douaire ne devra donc se prendre que sur la moitié des immeubles qui ont appartenu à Filion pour sa moitié dans les conquêts de la première communauté, c'est-à-dire, un quart du total, ou égal à un seizième pour le Demandeur François Honoré Filion. Il me reste maintenant à disposer des quatre autres exceptions, 5, 6, 7 et 8. Mais il n'est pas nécessaire de le faire séparément, parce qu'elles peuvent être examinées ensemble, en autant qu'elles ont rapport aux lots n°s 1 et 2, et quant au lot n° 3, l'action doit être déboutée, y ayant preuve que De Beaujeu, père en a fait l'acquisition au décret le 30 mars 1828, lors de la vente qui en fut faite par le shérif

sur le curateur élu au délaissement fait par Joseph Simpson, qui en était alors le détenteur. Pour ce qui est des deux autres, les exhibits n°s 13 et 14 des Demandeurs prouvent que le lot n° 1 fut acquis par M. Filion de Jean-Baptiste Leroux, par acte du 3 novembre 1810, Dubois et confrère, notaires, pour le prix de 2,000 fr. dont comptant 857 fr. et 1,143 fr. payables sous un mois. Par un avenir du 10 décembre 1810, au bas de la minute du contrat de vente, il appert que Leroux a été payé de la somme de 1,143 fr. en espèces réellement comptées, nombrées et délivrées à vue des mêmes notaires par Antoine Filion dont toute quittance et décharge. Le lot n° 2 fut acquis par Filion de Joseph Boileau, par acte du 6 mai 1809, Dubois et confrère, notaires, pour le prix de 400 fr. dont 60 fr. comptant et 340 fr. le 1er février alors prochain, 1810. Par un avenir du 22 décembre 1810, mêmes notaires, au bas de la minute du dit acte de la vente, le vendeur reconnaît avoir reçu, dès avant ce jour-là, de Antoine Filion, la somme de 340 fr. pour entier et parfait paiement du prix de vente, dont toute quittance et décharge. Les raisons et moyens invoqués par le Défendeur dans ces exceptions, sous une forme ou sous une autre, se réduisent à ce qui suit : Il allègue que, lors des deux acquisitions faites par par Filion en 1809 et 1810, des deux lots n°s 1 et 2, pour les prix sus-mentionnés, ils étaient chargés d'arrérages de cens et rentes et autres droits seigneuriaux depuis le temps de leur concession, lesquels n'avaient jamais été acquittés ni par le concessionnaire, ni par Filion, et formaient une créance privilégiée et antérieure à la création du douaire ; que Filion ne pouvant s'acquitter de ses dettes vis-à-vis de DeBeaujeu père, son créancier dès avant son premier mariage pour beaucoup plus que la valeur des propriétés qu'il possédait alors, et ne pouvant s'acquitter, dans la vue d'éviter des poursuites, fit cession, conjointement avec Marie Françoise Legault, sa seconde femme, par acte du 13 mars, 1830, devant Mailloux et sonfrère, notaires à DeBeaujeu père, de différentes propriétés, entre autres des lots Nos. 1 et 2, pour payer 6876 fr. 9d. qu'ils reconnurent lui devoir, pour prix de vente des terres sus-cédées, pour lods et ventes sur les acquisitions de Filion, et pour arrérages de cens et rentes seigneuriales ; DeBeaujeu père, en donnant quittance, mais se réservant , en cas d'éviction, tout recours pour l'exercice de ses créances et hypothèques seigneuriales et priviligiées contre qui il pourrait appartenir, sans que l'acte puisse lui nuire à cet égard, au cas d'éviction ; que cette cession ayant été faite en paiement de charges et créances antérieures et privilégiées au douaire réclamé par les Demandeurs, les immeubles en étaient affranchis et libérés. Le Défendeur prétend encore par ces exceptions, que DeBeaujeu père par la

cession du 13 mars 1830, étant redevenu propriétaire des immeubles par suite de ce que les arrérages de droits seigneuriaux ne lui avaient pas été payés, avait réuni, lors de l'acte de 1830, au domaine de la seigneurie de Soulanges, les dits immeubles, ce qui avait eu l'effet d'annuler le contrat de concession et d'affranchir les immeubles de toutes charges qui auraient pu y être imposées par le concessionnaire ou Filion. En point de fait, les prétentions du Défendeur sont que Filion n'avait jamais payé le prix de vente des immeubles, et que DeBeaujeu père, qui représente le Défendeur, était au droit des bailleurs de fonds, ou avait prêté à Filion les deniers employés par lui pour payer le prix de vente, et, en outre, que les arrérages de droits seigneuriaux n'avaient jamais été acquittés par Filion ou ses auteurs, jusqu'à l'acte de 1830. En point de droit, que, cette cession ayant été faite pour éviter des poursuites de la part d'un créancier privilégié, devait équivaloir à un décrêt forcé qui aurait été fait sur Filion, à la poursuite de DeBeaujeu, et enfin que la réunion au domaine, pour arrérages des droits seigneuriaux, avait eu l'effet d'affranchir les immeubles du douaire. Les Demandeurs, après avoir répondu par des réponses en droit à ces exceptions, que les allégués en les supposant vrais ne pouvaient avoir l'effet de purger le douaire, mais tout au plus de donner au Défendeur un droit de créance antérieur au douaire, ont en outre allégué que Filion père avait payé le prix des deux terres à ses vendeurs, ce qui est vrai, d'après ce que dessus rapporté par les quittances au bas des actes de vente ; que, lors du mariage du 6 novembre 1817, il n'était rien dû pour droits seigneuriaux par Filion ; cet allégué paraît justifié par la production d'une obligation notariée du 24 septembre 1829, consentie par Filion à De Beaujeu père, devant Mailloux, notaire, dans laquelle De Beaujeu père déclare que c'est " sans préjudice aux arrérages " de cens et rentes et autres droits seigneuriaux que Filion " pouvait lui devoir comme seigneur des seigneuries de " Soulanges et la Nouvelle-Longueuil, depuis le 11 novembre " 1816." Il suit nécessairement de cette déclaration que, le 6 novembre 1817, au jour de son second mariage, Filion tenait ses immeubles francs et quittes *d'arrérages* de droits seigneuriaux. Il n'est pas possible de lui donner un autre sens que celui qu'elle comporte si formellement, que Filion était quitte vis-à-vis de De Beaujeu, son seigneur, jusqu'à 1816 inclusivement. En présence des quittances au bas des deux actes d'acquisition de Filion et de cette réserve de De Beaujeu père en l'obligation qu'il s'est fait consentir par son beau-frère Filion, réserve qui ne peut être suspecte, puisque c'est le créancier qui dictait ses conditions à son débiteur, l'on ne peut ajouter beaucoup de foi aux déclarations contenues en l'acte

du 13 mars 1830, à l'effet de faire reconnaître à Filion qu'il devait à De Beaujeu, son beau-frère, les prix de vente des immeubles et les profits de lods et ventes auquels ils avaient donné lieu. D'ailleurs M. et Mme Filion par des déclarations faites en 1830, ne pouvaient pas faire revivre des créances éteintes et ce au préjudice de tiers, au préjudice de leurs enfants qui avaient des droits acquis résultant de leur mariage. S'il en était autrement, ce pourrait être un moyen à des conjoints de se faire des avantages indirects, ou ce pourrait être pour un mari un avantage considérable que de voir les créanciers d'un beau-frère primer les droits de sa femme et de ses enfants ; et nous avons vu plus haut que c'était contraire à notre droit. L'on peut répondre pareillement à la prétention du Défendeur que la cession du 13 mars 1830, doit avoir l'effet d'un décret. Il peut être vrai que De Beaujeu père aurait pu poursuivre en 1830 pour les arrérages de cens et rentes dus depuis 1817, et obtenir la vente par décret des immeubles nos 1 et 2, et par là les purger du douaire, mais n'ayant pas fait ce que la loi lui permettait de faire pour se protéger, il doit en supporter les conséquences, et il n'est pas possible de donner à une cession entre particuliers, entre beau-frères, la même valeur et les même priviléges que ceux qui sont accordés à une vente par décret. Le Défendeur n'a pu citer aucune autorité pour justifier cette prétention, et il ne peut nullement en être ainsi, autrement les intérêts des tiers seraient perdus par des transactions et des reconnaissances auxquelles ils n'auraient pas été parties et qui auraient été tramées à leur préjudice. Reste la prétention du Défendeur que la réunion au domaine a eu l'effet de purger les immeubles du douaire, mais tel n'est pas le cas. La réunion au domaine, (si toute fois il y a eu réunion au domaine) pas plus que la rétrocession volontaire, ne pouvait avoir l'effet de purger les hypothèques et charges intermédiaires créés entre la concession et la réunion. Voir Guyot, *des effets de la réunion au domaine*, sec. 11, p. 689 : " Il n'en est pas ainsi " des hypothèques et des autres charges que les anciens pro- " priétaires du domaine réuni y avaient pu imposer ; la réunion " y influe en aucune sorte. " La stipulation à l'acte de 1830 qu'au cas d'éviction, De Beaujeu rentrerait dans tous ses droits de créancier, ou comme seigneur, fait bien voir que les parties mêmes, savaient bien qu'elles ne pouvaient pas, en transigeant ainsi, porter préjudice à des tiers où à des créanciers de Filion, antérieurs à cet acte, et encore bien moins à l'égard des Demandeurs dont le droit n'était pas encore ouvert. Les 6e et 8e exceptions ont rapport aux impenses et améliorations que le Défendeur a le droit de faire valoir en diminution du douaire depuis l'aliénation des lots nos 1 et 2, par Filion ; et aussi pour la répétition des arrérages des droits seigneuriaux

qui auraient été payés par le Défendeur à son acquit ; il doit être ordonné une expertise pour faire un rapport avant de procéder finalement sur le remboursement que le Défendeur peut réclamer à cet égard, avant de prononcer sur les autres conclusions de la demande. Le Défendeur a prétendu avoir le droit d'être remboursé des charges municipales par lui payées, ou par ses auteurs, durant leur possession, mais il ne peut en obtenir le remboursement, parcequ'elles sont une charge de la possession. Il a aussi prétendu qu'il ne devait pas être condamné aux frais de l'action, au moins quant à présent, parceque le rapport des experts pouvait constater un tel montant à lui rembourser que le douaire serait totalement absorbé. Le Défendeur ayant contesté le droit même des Demandeurs à réclamer aucun douaire sur les immeubles, en prétendant qu'ils en avaient été totalement affranchis et libérés, il doit payer les frais de sa mauvaise contestation.

" La cour déclare l'assignation faite au Défendeur, le 28 octobre 1858, suffisante et légale, et a debouté l'exception à la forme ; considérant qu'il y a preuve que les Demandeurs, Françoise Julie Filion, Alexandre Sauvé et Anne Elmire Filion, son épouse, et Edouard Narcisse Filion, représenté en cette cause par Alexandre Sauvé, son curateur, se sont immiscés et ont fait des actes d'appréhension de la succession de leur père et beau-père, Antoine Filion, antérieurement à la renonciation par eux faite à la succession, a débouté l'action quant à eux. Puis adjugeant sur la demande au mérite, quant au Demandeur François Honoré Filion, elle la déboute, en ce qui regarde l'immeuble n° 3, désigné en la déclaration, lequel a été purgé du douaire par suite du décret fait d'icelui, ainsi qu'allégué dans la septième exception du Défendeur. Et, sans égard aux exceptions et défenses plaidées par le Défendeur, en ce qui regarde les immeubles 1 et 2, considérant que, le six novembre 1817, jour du mariage d'Antoine Filion avec Marie Françoise Legault. il était propriétaire en possession de la moitié indivise des immeubles Nos. 1 et 2, Et ce pour les avoir acquis durant sa première communauté avec Adelaïde Antoinette de Beaujeu, et que, par suite du mariage, le quart indivis de la totalité des deux immeubles est devenu affecté au douaire coutumier de Françoise Legault mariée au dit Antoine Filion, sans aucun contrat de mariage. Considérant, en outre, que les créances mentionnées dans les cinquième et septième exceptions du Défendeur comme dues par Antoine Filion au dit De Beaujeu, père, en supposant qu'elles fussent encore dues le 6 novembre 1817, jour de la constitution du douaire, ce qui n'est pas cependant prouvé, n'ont pu affranchir les immeubles du douaire, et que la prétendue réunion au domaine invoquée par le Défendeur, par et

à la suite de l'acte de cession du 13 mars 1830, ne pourrait avoir lieu au préjudice des droits antérieurs du Demandeur, comme douairier sur les dits immeubles, et que cette cession faite entre particuliers ne peut aucunement avoir l'effet, ou équivaloir à un décret forcé des immeubles, pour la satisfaction de charges et créances privilégiées au douaire ; a déclaré et déclare que le droit de douaire coutumier réclamé par François Honoré Filion consiste en un huitième indivis de la moitié indivise des deux immeubles Nos. 1 et 2, dont il est propriétaire à titre de douairier pour un quart. Et ordonne que le Défendeur lui en rende et remette la possession qu'il en a, avec les fruits et revenus de ce huitième indivis, depuis le 28 octobre 1858, jour de la signification de la demande. Et, vu le consentement des parties, en date du 4 octobre 1859, il est au préalable ordonné que, par experts à être nommés par François-Honoré Filion et par le Défendeur, si-non d'office par cette cour, ou l'un des juges d'icelle, il soit procédé, parties présentes ou icelles dûment appelées, à constater et établir, 1° Quelles sont les impenses et améliorations utiles et nécessaires faites sur les immeubles Nos. 1 et 2, ainsi possédés par le Défendeur, et de combien elles ont augmenté la valeur des immeubles, et ce eu égard aux anciennes bâtisses et constructions existant sur les immeubles lors de l'aliénation qu'en a faite Antoine Filion, lesquelles seront également estimées par les experts. 2° Quel a été ou pu être le montant des fruits et revenus des immeubles, depuis l'aliénation qu'en a faite Antoine Filion, jusqu'à l'introduction de la présente demande, et de combien les fruits et revenus se sont montés chaque année, déduction faite des frais nécessaires des cultures, et, enfin, depuis cette dernière époque jusqu'à l'opération des experts. Aussi quelles sommes de deniers peuvent avoir été payées par le Défendeur, ou ses auteurs, pour arrérages de cens et rentes ou autres droits seigneuriaux qui pouvaient être dus sur les immeubles par Antoine Filion, pour le temps qu'il en a été propriétaire, pour du tout il en soit fait compensation suivant la loi, et tel qu'il sera ordonné ci-après, eu égard à la part et portion indivise dont le Demandeur, François-Honoré Filion, est déclaré propriétaire pour un huitième indivis de la moitié indivise des deux immeubles. 3° Si les deux immeubles peuvent commodément être partagés et divisés entre François-Honoré Filion et le Défendeur, eu égard à la part de chacun en iceux ; lesquels experts entendront les parties et leurs témoins dûment assermentés devant un juge ou un commissaire, choisiront un tiers, en cas d'avis contraire, et feront de leur opération rapport à cette cour le ou avant le 18 février prochain, pour être sur icelui ordonné ce que de droit, réser-

vant à prononcer, sur et après le rapport fait et rapporté, sur les autres conclusions des parties. (5 *J.*, p. 128.)

CHERRIER, DORION et DORION, pour les Demandeurs.

LAFLAMME et LAFLAMME, pour le Défendeur.

JUGEMENT.—INSCRIPTION DE FAUX.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, 1er décembre 1858.

Coram Sir L. H. LAFONTAINE, Baronnet, Juge-en-Chef.
AYLWIN, J., DUVAL, J., CARON, J.

JOHN ROSS, *Défendeur en Cour Inférieure*, Appelant *vs.* CHARLES T. PALSGRAVE, *Demandeur en Cour Inférieure*, Intimé.

Jugé : Que, lorsqué la minute d'un jugement a été, après sa prononciation, falsifiée par des ratures dans une partie essentielle, le Demandeur n'a pas la voie de l'*inscription de faux*, mais doit s'adresser par requête au tribunal, pour demander que le jugement soit entré aux régistres tel qu'il a été prononcé. (1)

L'Intimé avait poursuivi l'Appelant, en Cour Supérieure, à Montréal, en *déclaration d'hypothèque* sur *quatre* Immeubles situés dans le Township Durham, et désignés sous les Nos. 1¾, 10, 17 et 15; l'Appelant avait opposé à l'action que la vente, qui lui avait été faite des dits lots, n'avait jamais été suivie d'exécution, et que, n'en ayant jamais eu la possession, il ne pouvait être condamné comme détenteur d'iceux : les parties avaient été entendues au mérite, devant les juges suppléants chargés d'administrer la justice, pendant les séances de la Cour Seigneuriale, en 1856, et, le 29 février, était intervenu jugement condamnant l'Appelant à délaisser les *quatre* immeubles, conformément aux conclusions de la demande. Le 11 Juin, exécution contre les meubles et immeubles de l'Appelant, et, le 30 du même mois, *opposition à fin d'annuller* de ce dernier fondée sur les moyens suivants : que le jugement du 29 février avait été après sa prononciation, et vers le 21 mars suivant, altéré et raturé dans une partie essentielle ; que toute la désignation du Lot No 17, "*Lot number seventeen, in the eleventh range, containing two hundred acres more or less,*" avait été rayée et bâtonnée, à la suggestion de l'Intimé, et hors la connaissance de l'Appelant, par un des Députés-Greffiers, sans l'intervention de la cour ; que la copie du jugement signifiée à l'Appelant avait été préparée avant que la minute fut raturée, car elle contenait aussi la désignation du Lot No.

(1) V. art. 159 et 474 C. P. C.

17, qui n'avait été rayée qu'après coup : qu'à raison de ces ratures, la signification du jugement était nulle et non-avenue, et que la saisie-exécution pratiquée sur ses biens, et qui, en loi, ne pouvait être prise que quinze jours après la signification du jugement, était irrégulière et illégale ; l'Appelant et réservait en outre le droit de recourir *à la voie de l'inscription de faux*, et, en effet, le 25 mai 1857, il s'inscrivit *en faux* tant contre le jugement que contre la copie. L'Intimé répondit par *Défenses au fonds en faits* à l'*Opposition* et aux *moyens de faux*. Sur instruction des faits, à l'Enquête, l'Appelant fit entendre trois témoins. 1. George Pyke, député-greffier, qui a pour mission spéciale de préparer les jugements de la Cour Supérieure, et qui a dressé le jugement argué de faux, déclare que, quand le jugement fut rendu, le vingt-neuf février 1856, les *quatre* immeubles y étaient prononcés sujets à l'hypothèque de l'Intimé, et *aucune rature n'y avait été faite ; que trois semaines après la prononciation* du jugement, l'avocat de l'Intimé vint demander une copie du jugement et la fit faire par George Kernick, lorsque, sur l'observation du témoin, que le lot No. 17, décrit au jugement, ne devrait pas s'y trouver, l'avocat examina le record, et *lui enjoignit* de raturer la désignation ; *ce que fit le témoin ;* cela eut lieu environ *trois semaines* après la prononciation du jugement. Il communiqua avec le juge suppléant Berthelot, au sujet du jugement, mais seulement par rapport à une *rature dans le calcul des intérêts*. Quand la rature du lot No. 17 fut faite, le jugement n'était pas paraphé. 2. Le juge suppléant Berthelot, qui avait prononcé le jugement, et dont les fonctions étaient expirées le 11 mars 1856, la Cour Seigneuriale ayant alors terminé ses travaux, déposa qu'il avait paraphé le jugement, *ne peut dire par qui la rature qui se trouve dans la désignation de la propriété a été effectuée*, mais il se rappelle qu'il fit faire des changements par Pyke *dans le calcul des intérêts ;* ne se rappelle pas *qu'on ait jamais attiré son attention sur la rature qui existe dans la désignation ;* ne se rappelle pas, mais il pourrait se faire, que ses initiales auraient été apposées sur le jugement *après le* 11 *mars* 1856. 3. Kernick, employé au greffe, a fait la copie du jugement en question, qui n'a été livrée à l'avocat de l'Intimé que le 4 d'avril, 1856 ; quand il fit cette copie, *la rature de la désignation du lot No.* 17 *n'avait pas encore été faite dans le jugement ; elle a été faite subséquemment dans le jugement et ensuite dans la copie ;* les jugements ne sont transcrits dans les régistres que *six ou sept mois après leur prononciation*. La Cour Supérieure prononça le jugement suivant : Saturday, the twenty-eighth day of November, 1857. Present, the Hon. Mr. Justice SMITH—" This " court having heard Plaintiff *en faux* and Defendant *en faux*,

" upon the merits of the *inscription de faux* made by Oppo-
" sant, John Ross, and the *moyens de faux* by him fyled, and
" also upon the motion of Plaintiff and Defendant *en faux*, of
" the twenty-fourth day of November instant, that the objec-
" tions made by him to the evidence of George Kernick,
" George Pyke and J. Amable Berthelot, be maintained and
" the evidence set aside, having examined the proceedings,
" proof of Record and deliberated, doth reject the motion
" of Plaintiff and Defendant *en faux*, and considering that
" Opposant, Plaintiff *en faux*, hath failed to establish the
" allegations of his inscription *en faux*, as set forth in the
moyens de faux, the court doth dismiss the same," et le 27 février 1858, la cour débouta l'opposition *afin d'annuller*, qui reposant sur les mêmes moyens que l'*inscription de faux*, devait nécessairement en subir le sort. Roy, pour l'Appelant : cette question intéresse tous ceux qui ayant eu recours à la justice et ayant vu leurs prétentions déterminées par un jugement définitif, ont cru que la minute de ce jugement, seul document qui constate les droits respectifs des parties jusqu'à son entrée aux régistres, c'est-à-dire, pendant six ou sept mois, ne pouvait être altérée par qui que ce soit, une fois que le jugement avait été prononcé. Le tribunal inférieur a semblé admettre que, tant que le jugement n'est pas enregistré dans les archives de la cour, toute partie dans la cause, et même le député-greffier, a droit de le reformer et d'y corriger ce qu'ils peuvent croire être des erreurs, sans avis à la partie adverse, qui cependant se guide d'après le jugement qu'elle a entendu rendre à l'audience, et qu'elle a lu ensuite au greffe dans son intégrité. Dans l'espèce, les moyens de faux sont prouvés à l'évidence, et l'Intimé les admet lui-même dans son *factum*, dans les termes suivants," When a copy of judgment was asked for, which he (Pyke) thinks was *three weeks after the rendering of the judgment*, the error was brought under the notice of Plaintiff's counsel, *who said, the lot 17 must be struk out, which Pyke did*, the draft of judgment *not being then paraphed* with the initials of the judge, and that, at the time of the erasure, *it was stated by Plaintiff's counsel* that Mr. Berthelot had been consulted and authorized the erasure." Rien d'ailleurs dans la procédure ne fait voir que l'insertion du lot n° 17 dans le jugement sur l'action hypothécaire soit une erreur; au contraire, la cour, en déclarant les quatre immeubles hypothéqués à la créance de l'Intimé, n'a fait qu'accorder les conclusions telles que formulées dans sa demande. Autre proposition ; une fois que le jugement a été prononcé et rendu, le tribunal se trouve dessaisi de la cause et n'y a plus de jurisdiction ; il ne peut donc rien y changer, si ce n'est peut-être quelqu'erreur évidente de calcul ; le greffier

doit le recevoir comme un dépôt sacré et l'entourer de toute sa vigilance pour le conserver intact ; c'est une doctrine reconnue par tous les commentateurs du code de procédure civile, et qui était également reconnue sous l'empire de l'ordonnance de 1667, dont l'art. 5 du tit. 26, exige impérieusement que le juge *paraphe à l'issue de l'audience, ou, dans le même jour, chacune sentence, jugement ou arrêt.* Cet article ayant été enregistré sans changements, au conseil supérieur de Québec, a force de loi devant nos tribunaux, comme toutes les autres parties de l'ordonnance qui n'ont pas été modifiées lors de leur enrégistrement, ou abrogées par nos statuts. Le juge en Cour Inférieure a exprimé l'opinion que, comme il arrivait souvent qu'un grand nombre de jugements étaient rendus le même jour, il serait impossible de les parafer dans les délais de l'ordonnance ; mais ce raisonnement *ab inconvenienti* ne peut prévaloir contre les injonctions formelles de cette même loi, dans l'art. 6 du tit. 1er ; " Voulons que toutes nos ordonnances, etc.," soient observées, etc. ; ni que sous prétexte d'équité, bien public, *accélération de la justice*, ou de ce que nos cours auraient à nous représenter, *elles, ni les autres juges, s'en puissent dispenser ou en modérer les dispositions, en quelques cas et pour quelques causes que ce soit ;* et, dans l'article 8 " Déclarons tous arrêts et jugements qui seront donnés contre " la disposition de nos ordonnances, etc., nuls et de nul effet " et valeur, etc." Si donc ces dispositions de l'ordonnance ne sont pas lettre morte, le jugement du 29 février 1856 est nul et non-avenu. A la vérité, l'usage est de parafer les jugements plusieurs jours après leur prononciation, mais cet usage est abusif, et lorsque l'intention d'un tribunal est attirée sur une telle illegalité, il ne peut se refuser à appliquer les dispositions de la loi. D'ailleurs, il est en preuve que, lorsque le juge suppléant a parafé le jugement, il n'a pas eu connaissance de la rature, et n'a pu, conséquemment, l'approuver ; et encore, l'eût-il fait, que la nullité n'en serait que plus apparente, vû qu'il ne pouvait seul, et sans leur concours, modifier un jugement prononcé par trois juges. Aucune mention des mots rayés n'est faite au bas du jugement. Enfin le juge suppléant avait paraphé le jugement après l'expiration de ses pouvoirs judiciaires, les juges réguliers ayant repris l'exercise de leurs fonctions le 11 mars 1856, époque où la Cour Seigneuriale avait terminé ses travaux. Indépendamment des raisons légales invoquées par l'Appelant, il avait aussi un grand intérêt à se plaindre de l'altération du jugement ; il n'avait jamais été mis en pessession des quatre immeubles, et, en les laissant vendre, à la poursuite de l'Intimé, il se proposait de les racheter, pour en être mis en possession en vertu d'un *acte* judiciaire ; ce projet était mis à néant, quant au lot n° 17, si la cour sanc-

tionnait le changement fait au jugement. En résumé, le jugement du 29 février 1856, a été falsifié, et la copie qui en a été signifiée à l'Appelant n'était pas une vraie copie du jugement tel que prononcé par la cour ; la saisie-exécution prise par l'Intimé sur les biens de l'Appelant était nulle et illégale, faute de signification de ce jugement, et, les faits étant prouvés, le tribunal inférieure devait octroyer à l'Appelant les conclusions de son *opposition afin d'annuller* et de son *inscription de faux. (1)* Robertson pour l'Intimé : Les objections faites par l'Intimé à l'examen de témoins, pour contredire les archives de cette cour, ont été réservées à l'enquête, et ensuite rejetées par le jugement final sur *l'opposition afin d'annuller ;* mais l'Intimé soumet que, même en traitant cette preuve comme légale et en admettant que l'on puisse adopter des procédés en *inscription de faux* contre les actes d'un officier de cour, pour changement et falsification des archives, il n'y a pas ici de preuve que le jugement ait été altéré ou falsifié ; il n'y a eu que la rectification d'une erreur découverte et corrigée, avant que le jugement ait été paraphé. Pyke dit en effet que, quand le jugement fut dressé par lui, il mit une note sur le dossier pour appeler l'attention de l'avocat de l'Intimé au fait que le lot No 17 était erronément compris parmi les immeubles hypothéqués ; que lorsqu'une copie de jugement fut demandée, ce qu'il croit avoir été trois semaines après la prononciation du jugement ; l'erreur fut communiquée au conseil de l'Intimé qui dit que le n° 17 devait être rayé, ce que fit Pyke, avant que les initiales du juge fussent apposées au jugement. Il parait d'après la preuve, et il était superflu de produire une telle preuve devant la Cour Inférieure, qui est censée connaître sa manière de procéder, que les projets de jugements sont dressés par le protonotaire et sont ensuite marqués des initiales du juge qui a présidé à l'audition quand il les trouve corrects ; c'est ce qui a eu lieu ici ; il eût été oiseux de laisser à une Cour d'Appel le soin de corriger une telle erreur. Il était du devoir du protonotaire d'appeler l'attention du juge présidant sur une erreur palpable, de la faire corriger, et de faire ensuite parapher le vrai projet de jugement. Il n'est pas facile de concevoir pourquoi l'Appelant s'est opposé au jugement pour de telle raisons.

CARON, J., *dissentiens :* Action hypothécaire contre Ross pour quatre lots de terre, qu'il est allégué détenir. Par le juge-

(1) Autorités citées par l'Appelant. Poncet, *des jugements*, n°s 78, 114 et 123 à la note ; Carré et Chauveau, T. 1 p. 701 et 703 à la note ; Serpillon, *Ord Civ.* sur art. 5 tit. 26 p. 487 et seq. et sur art. 6 et 8 tit. 1er ; Jousse, sur art. 5 du tit. 26 ; Merlin, *Quest. de D.* Voir *Jugement, p.* 95 ; Me lin *Quest. de D.* Voir *Inscription de faux*, § 1 p. 601 et 602, (Sign. de jugeme t.) ; Merlin, *Quest. de D.* Voir p. 617, *Espèce Perthon* ; Serpillon, *du Faux*, Questions de Droit *in fine*, p. 395 et seq ; Serpillon, (*Inscription de faux contre arrêts.*

ment, tel qu'originairement dressé, et tel que prononcé à l'audience, le Défendeur a été condamné à délaisser ces quatre lots, conformément aux conclusions de la déclaration. Depuis, ce jugement a été changé; tel que changé, il a été signifié, et le Défendeur n'ayant pas délaissé, sous le délai voulu, exécution a été prise, et les meubles du Défendeur ont été saisis. Opposition à cette saisie, fondée sur ce que, après la prononciation dn jugement à l'audience, déclarant hypothéqués les quatre lots pour lesquels l'action était portée (jugt. 29 février, 1856,) le jugement a été changé au moyen d'une rature faite sans l'intervention du juge ou de la cour qui l'avait rendu, par suite de laquelle, un des lots contenus au jugement, a été retranché, laissant trois lots seulement, au lieu de quatre que contenait l'action, et aussi le jugement tel qu'originairement rendu. Par cette opposition, *afin d'annuller*, le Défendeur déclare qu'il entend s'inscrire en faux, et contre la minute du jugement, et contre la copie qui lui a été signifiée, laquelle contient la rature qui se trouve au jugement, et il demande que la saisie faite en vertu d'un tel jugement soit déclarée nulle. Une inscription de faux, fondée sur ces mêmes alligués, a été produite, issue a été jointe, et les parties ont été à l'enquête. De la preuve faite, il résulte, que Pyke, dont c'est le devoir, avait préparé le projet du jugement et l'avait transmis aux juges pour leur approbation. Le 29 février, ce jugement fut prononcé cour tenante, tel que rédigé par Pyke, sans aucunes ratures. Environ trois semaines après, le procureur du Dumandeur demanda une copie, qui fut faite par Kernick, un autre clerc, conformément à la minute qui était restée et faisait partie du record; mais Pyke ayant fait remarquer à M. Robertson, procureur du Demandeur, que le lot 17, n'aurait dû être inclus ni dans l'action ni dans le jugement, sur l'avis de ce dernier, et sur la promesse qu'il fit de le faire approuver par le juge, Pyke retrancha du jugement, la partie qui regardait le lot 17, le retranchant tout à fait du jugement, qui se trouva, alors, ne renfermer que les trois autres lots. Le même changement fut fait dans la copie qu'avait faite Kernick, dans laquelle se trouvent les mêmes ratures, que celles qui sont dans la minute. Ces changements ont été faits hors de cour, et sans la connaissance même du juge qui avait paraphé la minute. Il n'est pas constaté clairement, à quelle époque, la minute du jugement a été paraphée par le juge Berthelot, si c'est avant ou après les ratures; pourtant Pyke dit que c'est après les ratures faites que le juge a mis ses initiales au dos, le juge lui, dit qu'il n'en sait rien. Tels sont les faits prouvés, se résumant à dire que le jugement rendu par la cour, en pleine audience, a été, hors de cour, altéré dans une partie importante de son dispositif, par un des clercs du protonotaire, à la requisition

du procureur du Demandeur, non seulement sans la permission de la cour, qui avait rendu ce jugement, mais même sans la connaissance de celui des juges de la cour, qui s'était chargé de le rendre et de le faire rédiger. Quand aux usages vicieux dont il est fait mention dans les témoignages, de ne signer les jugements que longtemps après qu'ils sont rendus et de ne les enrégistrer aussi que plusieurs mois après, cela ne fait absolument rien à la cause : c'est un usage contre la loi qui est un abus, et qui ne saurait être invoqué dans le cas actuel. L'on observera que la saisie, dont se plaint l'Opposant, a été faite en vertu de ce jugement *ainsi raturé ;* que c'est cette altération qui constitue le faux, allégué dans son inscription de faux ; que l'altération étant prouvée, la question à décider sur l'inscription de faux, était de savoir si cette altération constituait *un faux*, et, sur l'opposition, si ce faux emportait la nullité de la saisie. La cour inférieure a été d'avis que les allégués de l'inscription de faux n'étaient pas prouvés, et a renvoyé l'inscription de faux ; ce qui devait emporter, en même temps le renvoi de l'opposition. Quand à l'inscription de faux ; je ne comprends pas, comment après avoir déclaré que les témoignages de Pyke, Berthelot et Kernick étaient légalement pris, le juge a pu décider que les allégués de l'inscription n'étaient pas prouvés, les trois témoins prouvent *clariùs luce,* tous les allégués de l'inscription ; c'est un point sur lequel il ne peut exister aucun doute. Reste à décider si les faits prouvés constituaient un faux qui emportât la nullité de la saisie. Il a été prétendu que cette altération, quoique prouvée, toute illégale et condamnable qu'elle soit, n'annule pas le jugement ni la saisie ; que l'opposition est mal-fondée, que le remède de Ross aurait été de s'adresser à la cour qui avait rendu ce jugement, pour le faire rectifier et le remettre dans l'état où il était avant que que le greffier l'eût changé, pour ensuite être adopté telle procédure ultérieure qui serait nécessaire. Je ne crois pas cette prétention fondée ; si l'altération était illégale, la saisie a été faite en vertu d'un jugement, qui n'est pas celui de la cour qui l'a rendu. Si c'est le cas, sûrement ce jugement est nul en totalité, et la saisie faite en vertu d'un tel jugement est également nulle. L'opposition, qui informe la cour de ces faits de nullité, ainsi que l'inscription de faux, sur laquelle, preuve a été faite de ces faits, auraient dû être toutes deux maintenues, et la saisie déclarée nulle, sauf au demandeur à adopter ensuite tel moyen, pour faire rectifier son jugement, qu'il aviserait. C'est à lui à avoir un jugement correct pour pouvoir saisir, tant qu'il n'aura pas ce jugement, le Défendeur a droit de repousser la saisie. Il me paraît absurde de dire que le jugement a été altéré sans droit et d'une manière illégale, et que, cependant, la saisie qui a été faite en vertu de tel juge-

ment est valable. Ce n'est pas au Défendeur à faire rectifier le jugement, c'est au Demandeur à le faire. Si (suivant l'avis d'un Hon. Juge,) le jugement de la Cour Inférieure était confirmé, la saisie irait son train, et avant que le jugement eût été réformé, les meubles saisis seraient vendus depuis longtemps, et le Défendeur serait sans remède. Je ne nie pas aux cours le droit de corriger de suite, et sous certaines circonstances, certaines erreurs de forme ou de calcul ; mais ces changements mêmes doivent être faits par la *cour* qui a rendu le jugement, et ne peuvent jamais s'étendre au *dispositif* de pareils jugements. Les cas où ces rectifications et changements, sont permis ou défendus peuvent se voir aux autorités suivantes : 1 Pigeau 424, 425 ; I *Edits et Ord.*, page 186 ; 1 Berriat St. Prix, p. 21 et 22, note 21 ; le même, page 284, note 40 ; 4e Bioche, *Jugement*, No 331 et suivant ; 27 Merlin *Rép. Rature*, 100 ; Rogron, *proc. civile*, 466 ; 1 Carré, 700, sur article 138. De ces autorités, il résulte que toutes altérations de la nature de celles prouvées en cette cause, emporte la nullité du jugement. La raison dit qu'il serait par trop dangereux de tolérer la liberté que prendraient des officiers subalternes de changer les jugements des tribunaux qui les ont rendus. Je suis donc d'avis que les jugements dont est appel doivent être infirmés, et, par suite, le jugement sur lequel a été faite la saisie, déclaré faux et nul, sur l'inscription de faux : et sur l'opposition, elle doit être maintenue et la saisie déclarée nulle. Les causes de Chouinard, et la Fabrique de Kamouraska, et celle de Langevin, et Dunn, n'ont aucun rapport à la présente question. Dans ces cas, la cour a corrigé les erreurs commises par les greffiers, qui avaient entré un jugement différent de celui qu'avait rendu la cour. La cour, là, a ordonné à son greffier d'entrer dans son régistre le jugement qu'elle avait rendu, et non celui qu'il avait plû à ce greffier d'y insérer, différent et autre que celui de la cour.

Per curiam, Juge DUVAL. Il n'est pas douteux que, lorsqu'une fois un jugement a été prononcé par la Cour, il n'est plus au pouvoir de personne de le changer ni de le corriger, sous quelque prétexte que ce soit. Ici la preuve fait clairement voir que la correction qui a été faite au jugement du 29 Février, 1856, est illégale, et l'Opposant a droit de s'en plaindre ; mais ce n'est pas par *Inscription de faux* qu'une partie doit procéder en semblable cas, car le jugement qui a été rendu par la Cour Inférieure ne pouvait pas être faux ; c'était la rédaction du greffier qui était inacte et défectueuse, et l'Opposant devait s'adresser à la Cour Inférieure, pour faire rectifier cette rédaction, et demander que le jugement fût entré au Régistre tel qu'il avait été prononcé. Deux décisions rendues à Québec

" Chouinard et La Fabrique," et " Langevin et Dunn," viennent à l'appui de l'opinion de la majorité de la Cour.

L'honorable *Juge en chef* et le Juge AYLWIN, disent succinctement que l'Opposant ne pouvait pas procéder dans l'espèce par voie d'*Inscription de faux*. Jugement confirmé. (5 *J.*, p. 141.)

ROUER ROY, avocat de l'Appelant.

A. and W. ROBERTSON, avocats de l'Intimé.

PEREMPTION D'INSTANCE.—OPPOSITION A RATIFICATION DE TITRE.

SUPERIOR COURT, Montréal, 30 mars 1861.

Before : SMITH, Justice.

Exparte ROBERTSON, for Ratification of title, *and* POLLOCK *et al.*, Opposants.

Jugé : Que la péremption d'instance ne peut être invoquée dans le cas d'une opposition produite par un créancier hypothécaire, dans une procédure pour jugement de confirmation, en autant qu'il n'y a pas instance pendante. (1)

The applicant for ratification moved that the *instance* on the opposition of opposants be declared *perimée*, and the opposition dismissed, and filed a certificate of the prothonotary that the last proceedings on the opposition were had on the 20th May, 1850, when the opposition was filed.

Motion rejected on the ground that *péremption* could not be invoked in the case of an application for ratification of title, there being no *instance*. (5 *J.*, p. 150 et 11 *D. T. B. C.*, p. 285.

ROBERTSON, for petitioner.

ROSE, MONK and HOLMES, for opposants.

POSSESSION.—PREUVE.

QUEEN'S BENCH, Montreal, 12th November, 1863.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, DUVAL, MEREDITH and MONDELET, Justices.

JOHN STODDART et al., Plaintiffs in the Court below, Appellants, *and* LOUIS LEFEBVRE, Defendant in the Court below, Respondent.

Held : That when it is proved, in a petitory action, that the possession of the Defendant's predecessors in the occupation of the land claimed is

(1) Authorities cited in support of motion : Héricourt, pp. 154, 155, 156 : 3 Carré et Chauveau, *Question* 1140 *bis* : Ib. p. 402 : *Traité des Criées*, p. 136. V. art. 454 C. P. C.

antecedent to the date of the Plaintiff's title, although the Defendant may not be able to avail himself of such possession in support of a plea of prescription of thirty years, for want of a title thereto, the action of the Plaintifi will nevertheless be dismissed. (1)

Les Appelants, héritiers et représentants de Duncan Montgomerry et Mary McCuaig, portèrent une action pétitoire contre l'Intimé, par laquelle ils réclamaient de lui la propriété " d'une terre, de forme irrégulière, située dans la baronnie de " Longueuil, paroisse de Chambly. " Cette propriété avait été vendue et concédée, disaient les Appelants, par la baronne de Longueuil à Duncan Montgomerry, par acte du 27 octobre 1809, que Montgomerry avait pris possession de cet immeuble, en avait joui, et avait payé les cens et rentes et autres charges dont il était grevé ; que le premier avril, 1859, l'intimé s'était emparé de ce lopin de terre, causant aux appelants £100 de dommages.

L'Intimé plaida : qu'il avait joui, usé et possédé l'héritage pour l'espace de plus de trente ans, tant par lui que par ses prédécesseurs, franchement, publiquement et sans aucune inquiétation, entre âgés et non privilégiés, en sorte qu'il avait acquis, par la prescription, cet immeuble. Le défendeur disait encore qu'en supposant que les Demandeurs eussent quelques droits à cet immeuble, ou à aucune partie d'icelui, ce qui était spécialement nié, Duncan Montgomerry et Mary M. McCuaig n'en avaient jamais joui, et ne les avaient jamais possédés, mais au contraire c'était le défendeur et ses auteurs qui avaient ainsi possédé l'immeuble en premier lieu mentionné ; et c'était le Défendeur et les héritiers et représentants d'Alexis Guertin et leurs auteurs et prédécesseurs, qui avaient ainsi possédé l'immeuble ; et les possesseurs avaient, pendant plus de trente ans, satisfait à toutes les charges de voierie, publiques, particulières et mitoyennes, et à toutes autres charges et redevances auxquelles cet immeuble était assujéti.

Le 30 avril, 1864 la Cour Supérieure, à Montréal rendit le jugement suivant :

BERTHELOT, Justice : Referred to the authorities cited from Pothier and Troplong, and held that the possession of Defendant, and the prescription of thirty years, was sufficiently proved, without evidence of title under the particular circumstances of the case. (2) It was in evidence on the part of Defendant that he, as proprietor of the next farm, and all the other neighbors were proprietors in posseesion of the remainder of the whole gore or *vuide* of 86 *arpents* in superficies, in

(1) V. art. 2200 C. C.

(2) Troploug, *Prescription*, n° 435 ; Dunod, *Prescription*, p. 20, n° 5 ; Guyot Rép. vbo. *Prescription*, p. 314 ; Pothier, *Prescription*, n°s 119, 176.

rear of their farms, and had been so for more than thirty years. And there was nothing in the evidence of Plaintiff, oral or documentary, to rebut the evidence of Defendant that he derived his right of property and possession from Guertin and his representatives, and from Huot, the individual referred to in the evidence.

JUDGMENT: " Considérant que la seule portion ou partie de " l'immeuble revendiqué par les Demandeurs, dont le Défen- " deur est en possession, est désignée comme suit, savoir ; * * * " et qu'il en a été ainsi en possession, tant par lui, que par ses " auteurs et prédécesseurs, les propriétaires de la terre qui a " son frout sur le chemin de Chambly, depuis plus de trente " ans, et ce franchement, publiquement et sans inquiétation, ce " qui appert par la preuve, et que, par là, il en a acquis la pro- " priété, par la prescription de trente ans par lui invoquée " dans et par son plaidoyer, déboute la dite action. (1)

MEREDITH, Justice, *dissenting*: It is established incontrovertibly that the real estate in dispute in this cause forms part of a lot of land granted by the Baroness of Longueuil to one Duncan Montgomery, by a deed of sale and concession bearing date the 27th October. 1809 ; and that Appellants are the legal representatives of Montgomery. It is also, I think, sufficiently proved that Montgomery took possession of the land so granted to him. Léon Bigonnesse, the owner of the adjoining farm, says: "J'ai connaissance que Duncan Montgomery a " souvent vendu du bois sur ce terrain aux habitants de Cham- " bly ; il vendait ce bois au demi arpent, ou au voyage, Je " n'ai pas acheté du bois moi-même, de Montgomery, parce que " nous en avions sur notre terre." The evidence of this witness

(1) In a case N° 22, *McMillan* vs. *Whinfield*, a petitory action was brought by Plaintiff, as curator to the vacant estate of Alexander McMillan, deceased, under a deed of donation to the deceased from his father, dated the 5th February, 1828. The Defendant pleaded : 1° prescription of ten years, under a title *sous seign privé* to him from one Dubaie, of the 1st February, 1843 ; 2° prescription of thirty years, without naming Dubaie or any others as his *auteurs*. At *enquête*, the Defendant endeavoured to trace back his possession to other parties in possession of the lot anterior to Dubaie, as his *auteurs*, without producing any title in such parties, or from them to Dubaie, or to the Defendant. A rehearing was ordered by Mr. Justice BERTHELOT, on the point as to whether, in case Defendant were entitled to invoke the possession of the parties before Dubaie, without any evidence of title or connexion between them, the proof of such possession, as made of record was or was not sufficient, to shew that it extended over the thirty years : After the rehearing, the judge being of opinion that thirty years possession was not made out, judgment was rendered on the 30th April, 1861, in favor of Plaintiff, one of the motives being as follows : "Considérant, de plus, que le Défendeur " n'a pas suffisamment prouvé qu'il ait été, tant par lui que par ses auteurs, " en possession de cette partie du lot franchement, publiquement et sans in- " quiétation, pendant trente ans, avant la signification de la présente action, " de manière à pouvoir lui en faire acquérir la propriété par la prescription de " trente ans, etc."

is confirmed by that of Antoine Bigonnesse and Joseph Huot; and, considering that Montgomery, had, beyond doubt, a good title to the land respecting which it is proved he exercised acts of ownership, I think that the fact of his having taken possession is sufficiently proved. (1) At the same time, it may be observed that the title deed of 1809, from the Baroness of Longueuil to Montgomery, upon which plaintiffs rely, bears date before the commencement of the possession of Huot, which Defendant wishes to unite to his own; and authorities are not wanting to establish that, under such circumstances, the title of Plaintiffs ought to prevail over the subsequent possession relied on by Defendant. The well known rule on this subject, as it is to be found in Merlin's Repertoire, is as follows: "Mais quand le titre que vous produisez "est antérieur à la possession de la personne contre laquelle "vous avez une demande en revendication, il est, seul, suffi-"sant; parce qu'on présume que celui qui vous a vendu ou "donné l'héritage, en était le possesseur et le propriétaire." (2) The same rule is to be found in Guyot's Repertoire; (3) and, evidently, has been taken from the No 324, of Pothier, "Traité du Domaine de Propriété." In the present case, no doubt has been cast upon the title from the Baroness of Longueil to Montgomery; and, according to the foregoing authorities, under that title, which has not been questioned, and is of ancient date, Plaintiffs ought to have judgment in their favour, unless the subsequent possession upon which Defendant relies is sufficient to support his plea of prescription. The chief question, as to this part of the case, is as to whether Defendant can avail himself of the possession of Huot, anterior to his own, there being nothing to connect the two possessions, excepting that the one appears to have followed immediatly after the other. The authorities cited, as to this point, by the learned counsel for Plaintiffs in the court below, now Appellants, seem to me to establish clearly that this question ought to be answered in the negative. Nothing can be more explicit than the rule from Troplong, quoted by Appellants. "Il faut qu'il "y ait entre le possesseur actuel et le précédent possesseur, "une relation juridique, car s'ils se trouvaient juxtaposés, sans "un lien de droit, (which is exactly the case before us) *l'union* "*ne pourrait s'opérer.*" (4) And the example given by Troplong shows, beyond doubt, that, in the passage just quoted,

(1) Troplong, *Prescription*. p. 434, No. 251, and authorities in note (6) Ed. of 1836.

(2) Merlin, Rép. Verbo *Revendication*, § 11, No. 3, vol., 29 p. 418.

(3) Guyot, Rép. Vol., 15, p. 622, *Verbo Revendication*.

(4) Troplong, *Prescription* No 435.

he had reference to the prescription of thirty years. Troplong refers to Dunod, page 20, where we find the following passage: " L'on peut, pour rendre la prescription complète, joindre " à sa possession, celle de son auteur médiat ou immédiat, soit " qu'on y ait succédé à titre universel ou particulier, à titre " lucratif ou onéreux. Si, par exemple, l'on est héritier d'une " personne qui ait possédé pendant vingt ans. il suffira d'en " posséder encore dix, pour prescrire par trente années." Dunod, it is also plain, speaks of the prescription of thirty years; and, in common, as I believe, with all the other writers on the subject, (1) takes it for granted that one man cannot take advantage of the possession of another, unless he has succeded to such other " *à titre universel ou particulier;*" unless, in a word, there be between them some legal connecting link. As explaining the true meaning of the word *auteur* or *prédécesseur*, I may here refer to a passage in Marcadé to which our attention was also drawn by the learned counsel for Appellants. That author says: " C'est un point important que de " savoir quel est en notre matière le sens précis du mot auteur, " puisque selon que le possesseur qui m'a précédé, est ou n'est " pas mon auteur, je pourrai, ou ne pourrai pas bénéficier de " sa possession." (2) I may incidentally remark that here the author evidently takes it for granted that a possessor of real estate cannot, merely as such, claim the benefit of the possession of the previous possessor. Marcadé, after adverting to the rules on this subject laid down by Pothier and Troplong, gives his own definition of the word *auteur* as follows: " L'auteur " est celui à qui le possesseur actuel a légalement et régulière- " ment succédé dans la possession," and the author adds: " Du " moment, en effet, que la substitution du possesseur actuel au " précédent s'est faite d'une manière légale et pour une " cause iuridique, du moment que ce possesseur actuel est " bien le successeur légitime de l'autre dans la possession, " celui-ci est donc bien son auteur." The Respondent placed great reliance on the words: " supposé qu'il ne fasse apparoir de titre," which form part of the 118th article of our custom: but, in my opinion, those words establish that a party claiming the prescription of thirty years, need not show any other title than his prescription to the property in dispute; but, they do not show that a party claiming the benefit of the prior possession of another person, can effectually do so, without showing that the second possessor has taken the place of the first, as Marcadé says," d'une manière légale

(1) In addition to the authorities cited by Appellants, vide *Code Civ. du Bas-Canada, Tit. de la Prescription*, chap. 2, art. 19.

(2) Marcadé, *Prescription*, page 180.

et pour une cause juridique." At the argument, I adverted to a number of petitory actions instituted by me in 1840, in this district, for the heirs Allsopp; and, on looking into the records of some of those cases, I find that each of the Defendants pleaded the prescription of thirty years," *tant par lui-même que par ses auteurs et prédécesseurs*," and claimed the value of improvements made in the same way, *tant par lui-même que par ses auteurs et prédécesseurs*. The Defendants, in order to avail themselves of the possession of the previous possessors, submitted interrogatories such as the following to their witnesses." From whom has Defendant purchased the " lot of land and when ?" " Has not Defendant purchased said " parcel from one... who had purchased the same from one ?..." But these interrogatories were, of course, rejected; and the judgments rendered in those cases by Chief Justice VALLIÈRES, and Judges ROLLAND, GALE, and DAY, concluded as follows: " The court rejecting Defendant's claim for improvement made " by persons who possessed the land before him, and by him " called his *auteurs*, but not proved to be such." (1) It may be right to mention, although I do not think it affects the principle which those judgments tend to establish, that, although the possession proved in the Allsopp cases, extended over a very long period, and although the improvements proved in these case to have been made, were very extensive, yet, it was also established that the lands in dispute were generally known as belonging to the Allsopp family, and that Defendants, and those who had been in possession before them, were not generally considered as the owners of the land, but as persons holding it for their improvements. I shall conclude by observing that, at the time of the argument, it seemed to me, and it still seems to me, that to be convinced of the unreasonableness of the doctrine contended for by Respondent, it is only necessary to attempt to apply that doctrine to any ordinary case: for instance, we shall suppose B, having held a lot of land belonging to A, for a period of twenty-eight years, and being unwilling any longer to retain property not belonging to him, to give it up, and C, then, without any authority from B, to take possession of the same land, I ask, would it not, to say the least, be quite as reasonable, in the case supposed, for A. the true owner, to say that B possessed for him, as it would be for C, the second possessor, to claim the benefit of the possession of B. And, I further ask, would it be possible, in a

(1) *Vide* n° 411, *Allsopp* vs. *Scott*, 1842; 407, *Allsopp* vs. *Buck*; 409, *Allsopp* vs. *Gibbs*; 412, *Allsopp* vs. *Gillard*. In the article 2235 of the code civil, it is the word *auteur* that is used, but our custom uses the word *prédécesseur*, not only in the article respecting the prescription of thirty years without title, but also in the articles respecting the prescription of ten and twenty years with title. *Vide* articles 113, 114 and 118, C. P. C.

controversy between A, the owner of the land by title, and C, the possessor of it for two years, to award the land to C, because in addition to his own possession of two years, another person, namely B, had held the same land for twenty-eight years. Again, let us suppose that Defendant had pleaded that one Huot, possessed the land in question for a period of 20 years, *franchement, publiquement et sans inquiétation ;* and that he Defendant, then entered upon the land and possessed it in the same way for ten years; and that Defendant, by his plea claimed the land in consequence of Huot's possession, and his own, I think no difficulty would be felt in holding such plea bad upon demurrer ; and, yet, the allegations of such a plea would agree, in principle, with the facts proved in the present case. When this view of the case was mentioned at the argument, the senior counsel for Respondent observed, that there is a presumption in favor of the second possessor, that he is entitled to the possession of the first. No authority, however, was then cited, or has since been submitted, in support of this view, which is opposed to the opinions of Troplong, Dunod and the other writers on this subject, already adverted to, and it will be recollected that the Court of King's Bench at Montreal Chief-Justice Vallières being president, refused to admit such a presumption, even to support a claim for improvements. Upon the whole, it seems to me that Plaintiffs showed a good title to the land in dispute, namely, the grant from the Baroness of Longueuil, in 1809 ; and, therefore, that Defendant was not entitled to succeed on account of the weakness of his adversary. And I am further of opinion that Defendant was not entitled to succeed, on account of his own strength, because he could not add Huot's possession to his own ; and I, therefore, think that he was not entitled to the judgment which has been rendered in his favour. My brethern, Judges DUVAL and MONDELET, agree with me in saying that Defendant is not entitled to avail himself of the possession of Huot; and this being admitted it seems to me to follow, that Plaintiffs, whose titles and acts of possession, (by their admitted *auteurs*) are long anterior to the possession of Defendant, ought to recover the land in dispute. I am however alone in this opinion.

MONDELET, Juge : Action pétitoire. Le Défendeur invoque prescription de 30 ans, tant par lui-même que par ses prédécesseurs. Il est assez difficile de savoir à quoi s'en tenir à l'égard de l'une ou l'autre partie. D'abord la possession du Défendeur n'a pas été par *lui-même* de 30 ans. Que veut dire ce mot de la coutume, *prédécesseurs ?* Suffit-il que le Défendeur possède, et qu'il apparaisse qu'il possède ce qu'ont possédé des individus qu'il ne représente, ni à titre universel, ni à titre particulier, ou autre ? J'en doute fort, et je m'aper-

çois que ceux qui ont écrit sur cette question sont loin d'être d'accord. Que faire ? La coutume parle de *prédécesseurs :* les Tribunaux doivent-ils dire que ce mot signifie ou implique cession de droits à quelque titre ? La coutume se tait, mais la raison ne semble-t-elle pas nous suggérer qu'il faut qu'il apparaisse quelque rapport entre les prédécesseurs et celui qui, à sa propre possession, prétend unir celle de gens avec lesquels il ne fait pas voir qu'il ait le moindre lien ? Cela me paraîtrait assez vraisemblable. Quant à la tradition de la part de Montgomerry aux Demandeurs, ou à ceux qu'ils seraient dans le cas de représenter, où en est la preuve ? Les Huot et les Guertin, ayant eu la possession avant le titre des Seigneurs à Montgomerry, ne s'ensuivrait-il pas, si toutefois le mot *prédécesseur* reçoit de la part de la cour l'interprétation qu'y donne le Défendeur, que cette longue possession suffirait pour repousser la prétention des demandeurs ? Je le penserais. Autre question : Le Défendeur, dit-on, n'a jamais été en possession d'un lot décrit comme ayant 45 arpents, ce n'est pas le même terrain. On a dit, s'il a moins de 45 arpents, les Demandeurs auront moins. La réponse est qu'il s'agit de la description. Or, un lot de terre, une terre, un terrain décrit comme ayant 45 arpents, et qui se trouve avoir d'autres tenants et aboutissants, et moins d'arpents, n'est plus le même terrain. Si tel est le cas, l'action telle qu'intentée, ne pourrait tenir. Je pense donc que l'action devait être déboutée, comme elle l'a été.

Sir L. H. LAFONTAINE, Bart., Juge-en-Chef : Question de prescription de trente ans sans titre. 1° En fait, je suis d'opinion que le Défendeur a fait sa preuve, c'est-à-dire, tant par lui que par ses prédécesseurs, il a possédé, par l'espace de de trente ans, ainsi que l'exige l'article 118 de la coutume de Paris. 2° Le point de droit soulevé par les Appelants, est que Lefebvre, l'Intimé, ne peut joindre la possession de Huot à la sienne, n'ayant pas prouvé *qu'il était aux droits de Huot.* En effet, l'Intimé n'a pas produit et n'a pas invoqué de titre ; il s'est contenté d'invoquer le fait de la possession de son prédécesseur Huot, et de joindre cette possession à la sienne. L'article 118 lui donnant ce droit, " supposé qu'il ne fasse apparoir de titre," porte le susdit article. Les Appelants ont cité plusieurs autorités qui, dans ce qu'elles peuvent avoir en apparence d'applicable, ne se rapportent qu'aux prescriptions de 10 ou 20 ans, et plus particulièrement aux vices qui entachent ces prescriptions, tous plus ou moins reconnus dans le Droit Romain, " mais ils n'étaient pas un obstable à la prescription trentenaire," dit Troplong, au N° 437, le deuxième qui suit le N°. cité par les Appelants. *Dunod* a aussi été cité par eux : " Mais l'autorité de *Dunod,*" ajoute Troplong, au N° 442 " est

" ici très suspecte : il a laissé en route son guide habituel, d'Ar-
" gentré, et n'a pas fait attention à cette doctrine du savant
" interprète de la coutume de Bretagne : " Lorsque nous inter-
" rogeons nos institutions, nous trouvons que l'usage du barreau,
" le consentement du peuple, l'autorité du droit national, nous
" ont affranchi de ces distinctions de vices réels et personnels.
" Nous les avons exclus de la pratique et des jugements. Aucun
" vice ne s'oppose à l'acquisition des tiers par la prescription.
" L'utilité publique l'a emporté chez nous, et nous avons voulu
" consolider le domaine des choses et tranquilliser les acqué-
" reurs." " Dunod," dit Troplong, " a pu penser peut-être que
" d'Argentrée n'a ainsi parlé que pour la coutume de Bretagne ;
" mais tel était le droit commun." Il nous suffit de comparer les trois articles de la coutume de Paris, qui ont rapport aux deux principales divisions de la prescription. L'article 113 (prescription de 10 ou 20 ans) dit " *à juste titre et de bonne foi*, tant par lui que par ses prédécesseurs *dont il a le droit et cause*. . . . " et l'article 114, sur la même prescription, " par lui et ses prédécesseurs, *desquels il a le droit et cause*. . . . à juste titre, et de bonne foi. . . . " Dans l'article 118, prescription trentenaire, on trouve bien les mots " tant par lui que par ses prédécesseurs," mais, ni avant, ni après, on ne trouve ceux, " dont il a le droit et cause," non plus que ceux, " à juste titre et de bonne foi," des articles 113 et 114. Puis on lit, de plus, dans l'article 118, " supposé qu'il ne fasse apparoir de titre." En prescription de dix ou vingt ans, il faut un titre ; de plus, pour avoir droit à la jonction des possessions, il faut que celui qui invoque la prescription établisse qu'il " a le droit et cause," de son prédécesseur, soit à titre universel, tel qu'un héritier, soit à titre particulier, tel qu'un acheteur. Rien de cela n'est exigé en prescription trentenaire. " Celui qui n'a ni titre ni " bonne foi " dit Troplong, au N° 819, " prescrit contre toutes " les actions personnelles et réelles par trente ans." C'est en commentant l'article 2262 du Code Civil, que Troplong s'exprime de la sorte, et l'on sait que cet article est ainsi conçu : " Toutes les actions, tant réelles que personnelles, sont pres-
" crites par trente ans, sans que celui qui allègue cette pres-
" cription soit obligé d'en rapporter un titre, ou même qu'on
" puisse lui opposer l'exception déduite de la mauvaise foi." C'est en ce qui peut regarder la question qui nous occupe, la simple répétition de l'article 118 de la coutume de Paris. Cet article permet à un Défendeur qui est troublé, et qu'il exempte de faire " apparoir de titre," de " bonne foi," non plus, par conséquent qu'il " a le droit et cause," de son prédécesseur, de joindre seulement la possession de ce prédécesseur à la sienne. Voilà toute la preuve que la coutume exige du Défendeur, qui invoque la prescription trentenaire. C'est un simple fait que

le Défendeur a la liberté et le droit de prouver, sans prouver en même temps les rapports qui ont pu exister entre lui et son prédécesseur, autrement, il faudrait aller au delà de l'article 118, et dire qu'il exige ce qui n'y est pas écrit, ou plutôt qu'il exige même le contraire de ce qui y est écrit, à savoir : "supposé qu'il ne fasse apparoir de titre." Si en pareil cas, un Défendeur doit être tenu à faire la preuve des rapports qui ont pu exister entre lui et son prédécesseur, ce ne pourrait être tout au plus, ce me semble, qu'une preuve verbale. Or les témoins prouvent que l'Intimé a acquis de Huot, ou de ses héritiers. Je suis donc d'avis de confirmer le jugement. Le jugement de la Cour Supérieure est confirmé. (11 *D. T. B. C.*, p. 286 ; 8 *J.*, p. 31 et 13 *D. T. B. C.*, p. 481.)

DORION, DORION et SENÉCAL, pour les Appelants.

MOREAU, OUIMET et MORIN, pour l'Intimé.

STUART, HENRY, Q. C., conseil.

FEMME MARIEE.—PREUVE.

COURT DE CIRCUIT, Québec, 24 octobre 1863.

Présent : TASCHEREAU, Juge.

FUCHS, Demandeur, *vs.* TALBOT, Défendeur, *et* LARIVIÈRE *et al.*, Tiers-Saisis.

Jugé : 1° Qu'une obligation consentie par une femme mariée, séparée de biens, pour une dette de son mari, sera déclarée nulle, à la réquisition d'un tiers, partie à la cause.

2° Que, pour pouvoir être admis à faire preuve du contenu d'une telle obligation, il faut qu'il y ait commencement de preuve par écrit. (1)

Le Demandeur avait émané une saisie-arrêt après jugement contre le Défendeur, entre les mains de T. Larivière, J. Parent et Rose Talbot, épouse dûment séparée de biens, par contrat de mariage, de Parent. Larivière, un des tiers-saisis, répondit qu'il ne devait, ni qu'aucune circonstance lui donnait lieu de croire qu'il devrait à l'avenir, aucune somme au Défendeur. Le Demandeur contesta la déclaration du tiers-saisi Larivière, alléguant que Larivière était endetté envers le Défendeur pour honoraires, frais et déboursés, dans plusieurs causes, dans lesquelles le Défendeur avait occupé pour le tiers-saisi comme son avocat, et, notamment, que Larivière était endetté envers le Défendeur en une somme de £17.10 pour frais etc., dans la cause de *Larivière* vs. *Boivin*. Le tiers-saisi répondit à cette contestation qu'il ne devait rien au Défendeur, mais qu'au contraire le Défendeur lui était endetté : 1° en la somme

(1) V. art. 1234 et 1301, C. C.

de £153, avec intérêt, montant d'une obligation par laquelle le Défendeur, avec deux autres personnes y-mentionnées, s'obligeait de payer au tiers-saisi, Larivière, la susdite somme, et que le Défendeur était convenu avec Larivière que les services que le Défendeur lui rendrait resteraient en à-compte de l'obligation, et que les deux autres personnes y-mentionnées étaient insolvables et incapables de payer aucune partie de l'obligation ; 2° en la somme de £10 12 5¼, montant du jugement dans une cause de *Larivière* vs. *Talbot*. Le Demandeur répliqua que, quant à la somme de £153, montant de l'obligation produite par le tiers-saisi, pour laquelle somme le Défendeur se serait porté caution de Rose Talbot, tel qu'il était prétendu par le tiers-saisi, le Défendeur ne pouvait être tenu de la payer au tiers-saisi attendu que l'obligation avait été consentie par Rose Talbot, séparée de biens de Parent, son mari, pour les dettes personnelles dues par Parent à Larivière ; que le montant de l'obligation étant pour argent prêté, billets promissoires et autres dettes personnelles dues par Parent à Larivière, Rose Talbot ne pouvait légalement s'engager de payer cette somme ; que l'intention de Larivière, en faisant passer cette obligation au nom de Rose Talbot, était frauduleuse en autant que Rose Talbot ne lui devait rien alors ; que l'obligation étant nulle de plein droit, quant à la débitrice principale, et le Défendeur étant sa caution, il ne se trouvait pas engagé envers Larivière ; qu'une femme n'étant tenue des dettes de son mari que commune en biens, et Rose Talbot n'ayant jamais été commune en biens avec Parent, et le montant de l'obligation n'étant pas une dette de la communauté, Larivière ne pouvait compenser le montant qu'il devait au Défendeur au moyen de cette obligation. A ce dernier plaidoyer, le tiers-saisi Larivière répondit en droit, que la réplique spéciale du Demandeur ne pouvait valoir, et devait être rejetée du dossier," en autant que le " Demandeur excipe du droit d'autrui, et que dame Talbot " n'est pas en cause comme partie, et qu'elle ne conteste pas " la validité de la dite obligation." Déchêne, pour le Demandeur, produisit les autorités suivantes : 1° Sur la question de savoir si la femme non commune en biens peut être responsable pour les dettes de son mari : 3 *R. J. R. Q.*, p. 480, Jodoin et Dufresne *et ux :* Stat. Ref. B. C., ch. 37, sect. 55, et la cause de *Little* et *Diganar*, en appel. (1) 2° L'obligation étant nulle la caution de la femme est-elle déchargée ? Pothier, *Obligations* n°s 366, 367, 377 et suivants, 393, 395 et les n°s 50 51. 3° Le créancier de la caution peut-il demander la nullité du cautionnement ? 4° Si une preuve verbale suffit pour contredire

(1) 12 Dec. B. C., p. 178.

un acte authentique 7 *R. J. R. Q.*, p. 7 et 9, *Marcille* et *Fournier et al.*; 3 *R. J. R. Q.*, p. 211, *Halcro* et *Delesderniers*.

Malouin, pour le tiers-saisi : Le Demandeur ne peut réussir dans sa contestation de la déclaration du tiers-saisi, parce que l'acte d'obligation est valable si non pour le tout, au moins pour une grande partie. L'argent mentionné à l'acte a été avancé par Larivière à la femme séparée de biens, et le Défendeur est la caution de sa femme envers Larivière. Quand bien même l'obligation serait nulle en partie, la caution ne serait pas pour cela déchargée, elle continuerait bonne pour la partie de l'obligation qui resterait. (1) D'ailleurs la preuve faite par le Demandeur est illégale, il n'a aucun commencement de preuve par écrit.

TASCHEREAU, juge : Deux questions s'élèvent dans cette cause : 1° Le cautionnement consenti par le Défendeur est-il nul ? 2° Comment peut-on prouver que la somme, au lieu d'être prêtée à la femme, a été vraiment prêtée au mari ? Quant à la première question, je suis d'opinion que l'obligation ou le cautionnement du Défendeur est nul ou annullable, et cela parce que l'obligation de la part de la femme est frauduleuse ; mais comment la prouver nulle ? On ne peut détruire cet acte solennel que par une preuve par écrit, ou au moins par un commencement de preuve par écrit. L'on a cité la cause de *Marcille* et *Fournier*, où il a été décidé qu'une preuve orale serait admise contre un acte authentique. Les raisons données lors du jugement étaient que les faits particuliers de la cause donnaient lieu à la preuve testimoniale. Mon opinion est qu'on ne peut pas détruire un acte aussi solennel, aussi important, que l'acte d'obligation en la présente cause sans une preuve absolument sans tache, et contre laquelle il ne peut y avoir aucun doute ou reproche. La contestation de la déclaration du tiers-saisi est renvoyée. (13 *D, T. B. C.*, p. 494.)

DÉCHÊNE, pour le Demandeur.

LÉGARÉ et MALOUIN, pour le tiers-saisi.

APPEL.

QUEEN'S BENCH, APPEL SIDE, Montreal, 7 mars 1863.

Before AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

BRUNEAU, Appellant, and PREVOST *et al.*, Respondents.

Jugé : Qu'un jugement rendu par la Cour de Circuit, sur un appel d'un jugement de juges de paix, homologuant un rapport d'experts

(1) Pothier, *Obligation*, n° 375.

quant à un cours d'eau, et condamnant l'Appelant aux frais de l'expertise, est final ; et que, sous la 24e Vic., cap. 30, aucun appel n'est permis à la Cour du Banc de la Reine. (1)

In this case, it appeared that, on the 22d June, 1861, a *répartition* of certain works to be done on a *cours d'eau*, in the parish of St. Julie, county of Verchères, was made and deposited by Respondents, and that, on appeal to justices of the peace, an *expertise* was ordered, and the report of the experts homologated by the justices of the peace, and Appellant condemned to pay the cost of the *expertise*, £30 0 1½, by judgment of the 5th August, 1861. On appeal to the Circuit Court, Montreal, judgment was rendered (BADGLEY, J.) on the 27th September, 1861, dismissing the appeal. An appeal was taken to the Court of Queen's Bench, which, on motion by Respondent, was dismissed.

JUGEMENT : " Considérant que Olivier Théophile Bruneau, le Requérant pour appel à cette cour, du jugement rendu le 27 septembre 1861, par la Cour de Circuit, pour le district de Montréal, avait déjà épuisé devant la Cour de Circuit le droit d'appel qui lui était donné devant la dite cour, en vertu des dispositions du chap. 30 de la 24e Victoria, intitulé : " *Acte pour amender l'acte d'agriculture*," et que, par conséquent, il n'avait pas le droit de se pourvoir par un second appel à cette cour, a accordé et accorde la motion de Pierre Provost, et autres, pour le rejet de la requête du Requérant, laquelle est par le présent jugement rejetée, avec dépens de la motion." (13 *D. T. B. C.*,p. 498.)

DORION, DORION and SENÉCAL, for Appellant.

CARTIER and POMINVILLE, for Respondents.

APPEL.—CAUTIONNEMENT.—PROCEDURE.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 3 mars 1863.

Before : AYLWIN, DUVAL, MEREDITH, MONDELET and BERTHELOT, Justices.

KNOWLTON, *et al.*, Appellants, *and* CLARKE *et al.*, Respondents.

Jugé : Que la suffisance du cautionnement en appel ne peut être mise en question par une exception préliminaire et que telle exception sera renvoyée avec dépens. (2)

On the 27th January, 1863, Respondent filed in the Queen's Bench a pleading entitled " exception," commencing

(1) V. art 1061 et s. C. M.

(2) V. art. 1128 C. P. C.

in these words: "The Respondents, by this exception, say "that the court ought not to have or take cognizance of the "appeal in this matter, but that said appeal ought to be de-"clared *non-recevable*, firstly, &c.," setting up the insufficiency of the security, and concluding that the appeal be declared *non-recevable*, and thereupon dismissed, with costs. On the 18th February a demand of answers to this exception was served on Appellants, and on the 2d March, 1863, Respondents moved for leave to proceed *ex parte* "on the preliminary plea "pleaded upon the present appeal," for want of an answer, and, on the same day, Appellants moved that the exception be dismissed as irregular. Motion to dismiss exception granted, and motion to proceed *ex parte* rejected. (13 *D. T. B. C.*, p. 500.)

McKay and Austin, for Appellants:

Robertson, A. and W., for Respondents.

PRIVILEGE DE BAILLEUR DE FONDS ET DE CONSTRUCTEUR.

Cour Supérieure, Montréal, 31 mai 1861.

Coram Monk, J.

Doutre *vs.* Green, *et* Elvidge, Opposant.

Jugé: 1° Que l'expertise faite à la requête de l'architecte ou constructeur lors de l'inscription de son privilège, peut être récusée par le Bailleur de fonds, et que ce dernier peut obtenir une expertise contradictoire, si les deux privilèges viennent en conflit.

2° Que l'estimation respective des deux genres de propriétés doit être faite relativement à l'époque du décret et non relativement à l'époque où le privilège du constructeur a été enregistré.

3° Que le Bailleur de fonds a droit à la totalité de la valeur de la propriété lors du décret, et non à une part proportionnelle seulement. (1)

4° Que le créancier, porteur d'une garantie collatérale, ne peut être colloqué que conditionnellement, et qu'en attendant qu'il ait constaté s'il peut réaliser sa créance. les créanciers moins privilégiés ou postérieurs doivent être admis à toucher les deniers en donnant caution qu'ils videront leurs mains entre celles du créancier en premier lieu nommé, s'il est rejeté sur cette garantie collatérale.

Le Demandeur ayant fait vendre l'immeuble du Défendeur, pour le recouvrement du prix de vente de ce même immeuble, l'Opposant Elvidge se présenta à la distribution des deniers, comme cessionnaire des droits, privilèges et hypothèques du constructeur des édifices érigés sur l'immeuble pour une somme de £168. Le montant rapporté n'étant pas suffisant pour payer la créance du bailleur de fonds et celle du constructeur, ce montant étant réduit à la somme de $210 3s. 10d.

(1) V. art. 2009 et 2013 C. C.

par les frais et créances plus privilégiés que ceux du Bailleur de fonds et du constructeur, le greffier avait à distribuer cette dernière somme entre les deux parties. Voici comment le greffier répartissait cette somme de £210 3s. 10d : " And whereas P. Doutre claims, by privilege of *Bailleur de fonds* of the lot of land sold in this cause ; and W. Elvidge, on his part, claims by privilege of builder, for balance due on the price of certain buildings erected on said lot, and whereof the required valuations were made and registered ; and, whereas the balance remaining of the proceeds of the lot is insufficient to satisfy the two claims, the monies shall be divided between Doutre and Elvidge, in the proportion of the value of the lot, and that of the buildings, as established and valued by P. A. Rodier, expert appointed to appraize the same, to wit £100 for the ground, and £290 for the buildings, making a sum of £55 14s. 7d. as representing the value of the ground, and £164 9s. 3d. as representing the value of the buildings." Cette distribution fut attaquée par le Demandeur Opposant, sur les motifs suivants : " Que l'espèce de ventilation sur laquelle se fonde Elvidge n'a aucun fondement légal ; que l'estimation faite par l'expert d'Elvidge a eu lieu à l'encontre des droits du bailleur de fonds qui n'était pas partie à ces procédés ; que la valeur de £100 assignée au fonds, par l'expert du constructeur est arbitraire ; que ce même fonds avait été vendu pour £160, en février 1857, et que le Demandeur était bien fondé à faire faire une ventilation contradictoire du fonds et des bâtisses, que, de plus, Elvidge ne pouvait être colloqué d'une manière absolue, comme il l'avait été ; que le transport sur lequel était fondée son Opposition n'avait été fait que sous la modalité suivante, savoir : " The said W. Elvidge doth hereby declare that he intends to hold the present transfer against John Green, only as an additional and collateral security of the guarantee stipulated in the transfer unto him made by the latter, on the present day only ; for, as soon as the sums of money and interest contained in the last mentioned transfer will have been paid and collected, Green shall then be acquitted and discharged of the herein above transferred sum and interest." La contestation concluait " à ce que le rapport de collocation fût réformé ; qu'il fût procédé à la ventilation des propriétés et bâtisses contradictoirement, à frais communs, et à ce que le montant restant à distribuer le fût ensuite suivant la loi."

DOUTRE, J., pour le Demandeur : L'expertise faite sous la direction du constructeur n'est pas irrévocable pour les tiers. D'ailleurs, le Bailleur de fonds a droit, non à une proportion, mais à la totalité du prix de la nue propriété, à l'époque du

décret. Troplong, *Priv. et Hyp.* N° 80 *in fine;* Troplong, *Priv. et Hyp.* N° 244 ; Grenier, N° 411.

JUGEMENT : " Considérant que Joseph Doutre, ès qualité, est bien fondé à réclamer du montant prélevé en cette cause la valeur de la nue propriété, à l'époque de la vente faite par le Shérif, le deux octobre 1860, et que, sur la partie du montant ainsi prélevé qui représentera la valeur des bâtisses érigées sur l'immeuble, William Elvidge ne peut être colloqué que conditionnellement, et non d'une manière absolue et définitive, comme il l'est par le rapport de distribution. La cour ordonne et adjuge que la collocation d'Elvidge est et sera réformée ; et la cour ordonne qu'avant de distribuer le montant accordé par le rapport de distribution à Elvidge, il sera procédé, tant en vacance qu'en terme, à la diligence de l'une ou de l'autre des parties, à la nomination d'un expert de la part de Doutre, et d'un autre expert de la part d'Elvidge, avec pouvoir aux deux experts d'en nommer un troisième, soit avant ou durant leurs opérations, pour par les experts procéder à la ventilation et estimation de la valeur respective et séparée, au deux octobre 1860, de la nue propriété et des bâtisses érigées sur icelle. Et il est enjoint aux experts de faire rapport sans délai, les frais de la ventilation ordonnée devant être partagés également par Doutre et Elvidge. Et, enfin, la cour ordonne que, sur la production du rapport des experts au greffe de cette cour, il sera préparé un nouveau projet de distribution, d'après lequel la somme de £164 9s. 3d., restant à distribuer sera répartie comme suit : Doutre sera colloqué pour le montant auquel les experts auront évalué la nue proprieté, moins £51 13s. 3d., par lui déjà perçus, et Elvidge sera colloqué pour la balance, laquelle il aura droit de toucher sous 15 jours du jugement homologuant ce nouveau projet de distribution, si dans ce délai de 15 jours Doutre ne donne bonne et suffisante caution que, dans le cas où Elvidge ne réussirait pas, après diligence, à être payé de la somme de £375, en principal et accessoires, à lui transportée par le Défendeur, par acte devant J. Belle et son confrère notaires, en date du 20 Janvier 1858, Doutre videra ses mains dans celles d'Elvidge, du montant accordé à ce dernier par le jugement de distribution." (5 *J.*, p. 152.)

DOUTRE and DAOUST, avocats de J. Doutre.

M. DOHERTY, Avocat de W. Elvidge.

DECRET.—SES EFFETS.

COUR DU BANC DE LA REINE, EN APPEL,
Montréal, juin 1863.

Coram AYLWIN, J., DUVAL, J., MEREDITH, J., BERTHELOT, J. A.

JOSEPH DOUTRE, ès qual., *Opposant en Cour Inférieure*, Appelant, *et* WILLIAM ELVIDGE, *Demandeur en Cour Inférieure*, Intimé.

Jugé : 1° Que le Shérif ne donne à l'adjudicataire un titre valable à l'immeuble décrété qu'en autant que la vente a lieu *super domino*. (1)

2° Que la description par contenance, insérée dans les annonces du Sherif, dans ce cas, n'est pas une garantie de la quantité offerte en vente et réellement vendue.

3° Que le Demandeur, à la poursuite duquel le décret a eu lieu, peut faire saisir et vendre le même ou partie du même immeuble, vendu à sa propre poursuite, si la première vente a eu lieu *super non domino*.

Le jugement dont il y avait Appel avait été rendu, dans la Cour Supérieure, à Nelsonville, district de Bedford, par le juge McCord, le 13 octobre, 1862, et était conçu dans les termes suivants : " It is adjudged that the Opposition of Opposant be and the same is hereby hence dismissed." En vertu d'une exécution émanée de la Cour Supérieure, district de Bedford, dans une cause No. 170, où l'Intimé était Demandeur contre John B. Reynolds, le Shérif saisit, comme appartenant au Défendeur. " The equal undivided half of the south half of a certain tract of land known as lots numbered seventeen and eighteen of the first range of Foucault or Allard's Manor ; bounded, the whole of the said tract, as follows, to the north, by lot number nineteen, to the south, by lot number sixteen, towards the west by River Richelieu, and towards the east, by lot number thirty-eight, in the second range, and by other lots in the said second range, *containing said undivided half of said south half of said lot, forty-nine acres half a rod and twelve perches in superficies, more or less, with also all the buildings that may stand erected on the undivided piece or parcel of land and premises.*" C'est à la saisie et vente de l'immeuble ci-dessus décrit, que l'Appelant, en sa qualité d'Exécuteur testamentaire de Pierre Doutre, forma son Opposition *afin de distraire*, fondée sur un acte de vente, après décret, fait à Pierre Doutre, par David Browne, Shérif du distrit de Bedford, passé le 29 décembre, 1859. L'Opposant alléguait que Pierre Doutre étant en possession légale et réelle du dit immeuble, en vertu du titre en question, avait le 16 janvier

(1) V. art. 632 C. P. C.

1860, vendu le même immeuble à David S. Clark ; que le 22 décembre 1860, Pierre Doutre fit son testament, instituant l'Appelant son exécuteur testamentaire ; que, le 9 février, 1861, Pierre Doutre est mort ; que David S. Clark ayant négligé ou refusé de payer son prix d'achat, l'Appellant avait obtenu, le 30 mars 1861, un jugement devant la Cour Supérieure, à Montréal, résiliant le dit acte de vente, et réintégrant l'Appelant dans la propriété et la possession du dit immeuble ; que le dit immeuble vendu, comme dit est, par le Shérif au dit Doutre, puis revendu par ce dernier à Clark et remis à l'Appelant par le dit Jugement, était le même que celui saisi, sous la même description que celle contenue dans le titre du Shérif, et que l'Appellant était bien fondé à demander que le dit immeuble fût distrait de la dite saisie. L'Intimé contesta cette Opposition alléguant : que, le 12 mars 1856, John Greene, qui était alors en possession, comme propriétaire, de tout le morceau de terre, dont la moitié indivise maintenant saisie faisait partie, avait, avec Lucy Bissell, sa femme, par deux actes de vente portant la même date, l'un en faveur de Jacob Young the Third, l'autre en faveur de Lucy Adela Reynolds, sa femme ; vendu au dit Jacob Young the Third, avec une plus grande étendue de terrain la moitié indivise du morceau de terre décrit et réclamé par l'Appelant ; et à Lucy Adela Reynolds l'autre moitié indivise du même morceau de terre, avec une plus grande étendue, de sorte que Jacob Young et sa femme devinrent propriétaires, par indivis, du morceau de terre réclamé par l'Appelant, dont une moitié indivise est saisie ; que ces ventes furent faites pour le prix de $850 pour chaque partie, avec hypothèque de bailleur de fonds ; que, le 20 janvier, 1858, John Greene avait transporté au Demandeur, 1° la somme de £187 10 0 à lui due, par Jacob Young, pour balance du prix de vente, 2° une même somme de £187 10 0, à lui due par Lucy Adela Reynolds, pour balance du dit prix de vente ; que cette dernière ayant négligé de payer le prix de vente, l'Intimé avait obtenu, en vertu du dit Transport, un Jugement en exécution duquel il avait fait saisir et vendre la moitié indivise du morceau de terre dont l'autre moitié indivise est maintenant sous saisie en cette cause ; que le Shérif n'a vendu à Pierre Doutre que la moitié indivise appartenant à l'épouse de Jacob Young ; que ce dernier ayant aussi négligé de payer, l'Intimé avait obtenu jugement contre le Défendeur en cette cause, comme tiers-détenteur de la moitié indivise appartenant ci-devant à Jacob Young, en exécution duquel jugement la saisie en cette cause avait été pratiquée ; que Pierre Doutre n'avait acquis que la moitié appartenant à Lucy Adela Reynolds et que la moitié appartenant à Jacob Young restait à vendre. L'Appelant répondit : Que, lors

de la vente du 14 décembre 1859, Pierre Doutre avait acheté un corps certain, "*containing said undivided half of said south half of said lots, forty-nine acres half a rod and twelve perches in superficies, more or less*, with also all the buildings *that may stand erected on the undivided piece or parcel of land and premises*": que ni Pierre Doutre ni aucun des enchérisseurs, n'était tenu de savoir l'étendue de tout le morceau de terre contenant la portion indivise mise en vente; que le seul intérêt qu'avait Pierre Doutre, ainsi que tout autre enchérisseur, était de connaître l'étendue ou la quantité du terrain offert en vente, laquelle étendue ou quantité était de 49 acres, un demi rod et 12 perches: que, depuis les acquisitions faites, en 1856, de John Greene par Jacob Young et sa femme, les dits 49 acres, avec les bâtisses érigées avaient été en la possession commune de ces derniers; que le jugement obtenu contre le Défendeur John B. Reynolds avait été obtenu par fraude et déception; que le dit Jugement étant quant à l'Appelant, *res inter alios*, ne pouvait pas être mis à exécution contre les intérêts de l'Appelant; que le Défendeur n'avait jamais possédé le dit immeuble et ne pouvait pas être appelé à le délaisser en justice; qu'en conséquence, le jugement dont l'Intimé poursuivait l'exécution était nul et sans valeur à l'égard du dit immeuble et de l'Appelant; qu'après la vente faite par le Shérif au dit Pierre Doutre, le 14 décembre 1859, de 49 acres, une demie rod et 12 perches de terre, il ne restait plus, dans le premier rang de Foucault, aucun terrain appartenant à Jacob Young, sa femme ou le Défendeur; qu'un jugement ayant été rendu à Nelsonville, par la Cour de Circuit, le 21 juin 1859, dans une cause où Ira Taylor était Demandeur contre le dit Jacob Young the Third, une exécution contre les terres de ce dernier serait émanée de la dite cour dans la dite cause, et le Shérif aurait saisi les quarante-neuf acres, une demi-*rod* et 12 perches qui avaient été précédemment vendus au dit Pierre Doutre; que le jour de la vente, dans la cause de Taylor contre Young, le 7 mars 1860, le Demandeur (l'Intimé) étant présent, enchérisseur, le Shérif aurait, à la connaissance et du consentement de l'Intimé, refusé de mettre en vente les 49 acres et une demi-*rod* et 12 perches, en question en cette cause "for the "reason that the said described lands et tenements had been "previously sold by me by virtue of a writ of *Fieri Fa-* "*cias* issued out of the Superior Court for the District of "Bedford, number fifty-two, wherein William Elvidge was "Plaintiff, and Lucy A. Reynolds wife of Jacob Young the "Third was Defendant," faisant par là le Shérif, allusion à la vente faite au dit Pierre Doutre, et affirmant qu'il lui avait vendu le dit morceau de terre; que, depuis la vente faite par le Shérif, à Pierre Doutre, les dits 49 acres, une demi-*rod* et 12 perches

de terre avaient été possédés successivement et sans interruption par Pierre Doutre, puis par David S. Clark, et ensuite par l'Appelant jusqu'à la saisie faite en cette cause, et ce à la connaissance de l'Intimé, et que, depuis 1856, jusqu'à la vente par le Shérif à Doutre le terrain avait été possédé par Jacob Young et sa femme, et que, depuis 1856, le Défendeur n'en avait rien possédé ; que John Greene et sa femme, les vendeurs de Jacob Young et Lucy Adela Reynolds n'ont jamais possédé plus des 49 acres une demi-*rod* et 12 perches. sur les Nos. 17 et 18 du premier rang de Foucault ; qu'il appert de ce qui précède que le Shérif ne pouvait saisir aucune terre répondant à la description contenue au Procès-Verbal, sans saisir la terre de l'Appelant, et qu'en conséquence la saisie faite est nulle. En addition à ce qui précède, l'Appelant répondit que, s'il avait été commis aucune erreur, soit dans la saisie ou dans la vente où Pierre Doutre est devenu adjudicataire, le Demandeur (l'Intimé) était légalement responsable de telle erreur, étant le Demandeur dans la cause où la vente était faite à Doutre, et telle vente étant faite à sa poursuite et pour son avantage, l'Intimé ayant de plus touché la plus grande partie du produit de la vente, en vertu du jugement de distribution qui s'en est suivi : que l'Intimé était de fait le garant de l'Appelant contre toute telle erreur, ou fausses directions dans les procédés du Shérif ; qu'en supposant que Doutre n'ait acheté que la moitié de 49 acres, (ce que niait l'Appelant), il croyait évidemment acheter 49 acres tel qu'annoncé, et que l'Intimé ne pouvait avoir aucun intérêt à faire vendre l'autre moitié, attendu que, dans ce cas, il serait tenu, comme garant de l'adjudicataire, de rembourser à l'Appelant la moitié du prix payé par Doutre au Shérif. Sur l'ordre de la cour, un arpenteur est allé sur les lieux, et a fait un plan, d'après lequel il paraît que la moitié des Nos. 17 et 18 ne contenait que la quantité offerte en vente, savoir 49 acres, etc.

MOYENS *de l'Appelant :* Il est hors de doute, que la description de l'immeuble, vendu par le Shérif à Pierre Doutre, le 14 décembre 1859, était vicieuse, comme l'est aussi la description de l'immeuble saisi. Il est de fait que les Nos. 17 et 18 ne sont que d'à peu près cinquante acres chacun, en sorte que la moitié indivise de la moitié de 100 acres ne pouvait jamais former 49 ou 50 acres. On trace cette erreur jusqu'aux actes de vente par John Greene à Jacob Young d'une part et Lucy Adela Reynolds de l'autre. On voit dans ces actes que Greene vend séparément au mari et à la femme une égale moitié indivise de la moitié indivise des lots Nos. 17 et 18, *laquelle moitié indivise de la moitié indivise contient* 49 *acres*, etc. L'Intimé est en possession de ces actes, et c'est là sans doute qu'il a puisé la direction donnée au Shérif. Si le Shérif eût été laissé à lui-même, avec l'ordre donné par la cour de saisir les biens

de Jacob Young ou de sa femme, il ne lui serait jamais venu à l'idée de saisir d'après une description artificielle ou conventionnelle une propriété dont il pouvait mesurer l'étendue. Le Sherif eût constaté, sur les lieux, ce que l'arpenteur a trouvé, c'est-à-dire, que Jacob Young et sa femme n'avaient jamais possédé que 50 acres à eux deux. L'intimé a été l'auteur de cette erreur, tant dans la saisie où Pierre Doutre s'est rendu adjudicataire, que dans la présente cause, où l'on retrouve le même vice de description. Pierre Doutre a-t-il acheté 49 acres, une demie *rod* et 12 perches ? La chose est indubitable. On ne peut pas vouloir que des tiers, se rendant à une vente judiciaire, se fassent accompagner d'un arpenteur pour vérifier les calculs du mesurage de l'officier préposé aux décrets. Les tiers ne doivent s'attendre à d'autres risques que ceux résultant du *plus ou du moins*, dans les ventes ordinaires. Pour se convaincre que Pierre Doutre a bien acheté 49 acres une demi-*rod* et 12 perches, nous avons le meilleur témoignage possible, attendu qu'il procède de l'officier de la cour (le Shérif) et que ce témoignage n'a été sollicité en aucune manière. Ce témoignage se trouve dans le rapport fait par le Shérif, sur l'exécution émanée dans la cause de Ira Taylor contre Jacob Young the Third. Là aussi le Shérif avait reçu de fausses directions, dans la description des immeubles à saisir ; mais il n'avait pas encore eu l'occasion de s'apercevoir de l'erreur qu'on lui faisait commettre. C'est le 25 octobre 1859, que le Shérif procède à la saisie, dans la cause de Taylor, et ce n'est que lors de la vente à Doutre, le 14 décembre 1859, qu'il s'aperçoit du vice de description ; et quand il arrive à la vente, *in re* Taylor and Young, le 7 mars 1860, il déclare qu'il ne vend pas le numéro Un, pour la raison qu'il l'a déjà vendu, dans la cause où William Elvidge était Demandeur contre Lucy Adela Reynolds. Dans la confusion que tendait à créer les termes " *The equal undivided half of the south half*," la quantité assignée à l'immeuble était le seul trait de lumière sur lequel les tiers pouvaient s'orienter ; et que dit le Shérif, relativement à l'étendue de l'immeuble offert en vente ? Il dit que la partie vendue contient 49 acres, une demie *rod* 12 perches ; *containing said undivided half* of said south half of said lot, of 49 acres half *a rod and twelve perches*. L'Intimé, malgré ces expressions positives, persiste à dire que la moitié seulement de cette quantité a été vendue à Pierre Doutre. Mais ce qui tendait encore davantage à faire croire aux enchérisseurs que c'était 49 acres qui étaient vendus, c'est que toutes les bâtisses, et non une partie indivise, sont mises en vente, "*with also all the buildings that may stand erected on the said undivided piece or parcel of land and premises.*" La conduite de l'Intimé est bien propre à faire douter si ces

erreurs sont tout à fait involontaires. Etait-ce dans le but d'écarter la concurrence et de devenir le seul enchérisseur possible que cette confusion est maintenue dans les saisies? Ce qui est certain c'est que le jugement originaire, dont il poursuivait l'exécution sur la propriété de l'Appelant a été obtenu par fraude : que le Défendeur Reynolds n'a jamais possédé aucune partie du dit immeuble ; qu'à l'époque ou ce jugement fut rendu (13 février 1861) Clark, qui avait acheté de Pierre Doutre, était en possession actuelle et ouverte, par l'entremise de son locataire, le témoin Westover. Accusé d'avoir obtenu ce Jugement frauduleusement, l'Intimé n'a pas fait la plus légère tentative pour repousser l'accusation. Il laisse en preuve, sans contradiction, le fait que Reynolds, un étranger qu'il a capricieusement choisi comme Défendeur, dans les Etats-Unis n'a jamais possédé l'immeuble en question. S'il avait une action hypothécaire à exercer c'était contre Pierre Doutre ou ses représentants qu'il eût fallu agir. Redoutant sans doute l'exception de garantie qui lui aurait été opposée, il a cru tourner la difficulté en poursuivant un étranger, qui ne pouvait avoir aucun intérêt à le gêner. La responsabilité du Demandeur poursuivant le décret, solennellement consacrée par un jugement de cette cour dans la cause de *Desjardins* et *La Banque du Peuple* : cette responsabilité admise, dans les cas analogues à celui-ci, devait avoir comme conséquence directe de soumettre l'Intimé à l'obligation de garantir l'Appelant contre le trouble qu'il aurait pu éprouver de la part des tiers, et le jugement de la cour inférieure la méconnait dans un trouble causé par le garant lui-même ! Il est impossible que le système de la cour inférieure et la doctrine consacrée par cette cour, dans la cause de Desjardins, puissent co-exister concurremment. En appliquant la doctrine de cette cour, le jugement de la Cour Inférieure ne peut recevoir d'exécution utile, puisque si l'Appelant perdait la moitié de l'immeuble qu'il a cru acheter, l'Intimé serait contraint de rembourser la moitié du prix de vente payé au Shérif. Pour corriger l'erreur, dont l'Intimé est seul coupable et responsable, on ouvrirait la porte à de nouveaux litiges, où l'Appelant chercherait à se faire indemniser d'une perte occasionnée par la faute de l'Intimé. La vente faite à Pierre Doutre par le Shérif, a reçu la consécration du fait accompli, par une possession de trois ans, et l'Appelant espère que cette cour verra, dans le maintien de cet état de choses, l'application des vrais principes, le respect dû aux décrets et la satisfaction des fins de la justice. *Autorités de l'Appelant :* 2 *R. J. R. Q.*, p. 148, *Grey* vs. *Todd* ; défaut de contenance, en matière de décret, donne lieu à la diminution du prix. Thibaut, *Traité des Criées*, p. 302, No. 15 ; Guyot, Rép., Vo. *Adjudication*, pp. 168, 169 ; Nouveau Denizart, Vo.

Décret, p. 46, No. 3 ; Henrys, *t.* 2, p. 548, question LXXXV. No. 3, "En troisième lieu, d'autres font distinction entre la vente volontaire et celle qui est nécessaire, et qui se fait par décret judiciel. Ils veulent que la première commençant *à corpore*, l'acheteur ne puisse pas obliger le vendeur à maintenir la contenue : Mais en la seconde, ils rendent la condition d'un adjudicataire plus favorable, possible parce qu'il s'assure sur la foi publique, et que le décret comprenant d'ordinaire plusieurs héritages, la connaissance en est plus malaisée ; c'est en un mot, parce qu'il ne peut prendre autre pied que celui de la contenue qu'il voit déclarée dans les placards. N'importe que les confins soient référés ; car nonobstant cette relation, il est plus aisé de se tenir à une contenue certaine, et de faire fondement sur icelle, que de vérifier divers confins, qui le plus souvent sont incertains. C'est à quoi semble se ranger Tronçon, sur l'art. 346 de la *Coutume de Paris.*" No 5. Ayant été consulté sur ce point, au sujet des héritages de Pierre Marraud, vendus en la Sénéchaussée de Riom, nous fûmes d'avis que l'adjudicataire était bien recevable à se plaindre du défaut qui se trouvait en la contenue, et que c'est sur le prix qu'il devait obtenir son remplacement ou dédommagement, et pour les frais, qu'il devait être renvoyé contre le poursuivant ou contre les Opposants qui le lui contesteraient. *C'est parce que le saisissant ayant failli en la contenue, il devait porter les frais qu'il causait par sa faute ;* mais pour le remplacement ou dédommagement, il n'est pas juste qu'il tombe sur lui, et il faut qu'on le prenne sur le prix. C'est parce qu'on présume que si l'adjudicataire n'avait cru que la contenue fût telle que les placards portaient, il n'aurait pas fait une enchère si haute ; par conséquent, que l'erreur ayant fait augmenter le prix c'est sur lui qu'elle doit être réparée, etc. "Nous ajoutions que les ventes judicielles ne se règlent pas toujours comme les volontaires ; et qu'au lieu qu'en celles-ci on se fie à la foi d'un particulier, en celles-là on contracte sur la foi publique et sur l'assurance des placards. Quoique communément un acheteur n'achète pas au hasard, et qu'il soit présumé s'enquérir de la chose, *il serait toutefois trop rude de vouloir astreindre un adjudicataire à vérifier tous les fonds et ce qu'ils contiennent.* Aux décrets qui se font à Paris, tous ceux qui enchérissent n'ont pas vu les héritages, et sans savoir au vrai, ils s'en assurent sur les placards et sur la saisie," etc. No. 6. "Aussi nous avons été assuré que la plainte de l'adjudicataire fut jugée raisonnable." *Idem*, p. 550. "Si l'acquéreur par décret peut agir en garantie contre le poursuivant, quand la quantité d'héritages ou de mesure contenue dans les affiches, ne se trouve pas. Mais la difficulté consiste à savoir, si lorsqu'il y a lieu à l'indemnité, l'adjudicataire

doit se pourvoir sur le prix de son adjudication, ou s'il doit avoir recours contre le poursuivant. L'auteur distingue entre le prix de la diminution, pour lequel il renvoie l'adjudicataire sur les deniers par lui consignés, et les frais qu'il a été obligé de faire pour établir le défaut de mesure ou de quantité, pour raison desquels il le renvoie contre le poursuivant, ou contre les Opposants qui ont formé la contestation. Mais dans l'un et dans l'autre cas, je crois que l'adjudicataire est bien fondé à se pourvoir sur le prix de son acquisition. quand il ne serait pas encore distribué aux créanciers ; et, si le prix est consumé, il est bien fondé à revenir pour le tout contre le poursuivant." *Idem*, p. 552. " Nouvelles observations. Dans ma première observation, j'ai parlé de la garantie de l'adjudicataire, quand il y a défaut de mesures ; mais je n'ai pas parlé du cas de l'éviction." A l'égard du poursuivant, il faut distinguer si l'éviction arrive par quelques défauts de formalités, il en est tenu." Tronçon, *Coutume de Paris*, p. 776 : " Si un adjudicataire par décret d'un héritage saisi et mis en criées, est évincé de son adjudication, les parties remises en tel état qu'elles étaient auparavant, ayant payé et consigné le prix actuellement, pour en être remboursé, peut demander, tant avec le saisi qu'avec les créanciers Opposants, qui ont été mis en ordre, et remboursés sur le prix de la nouvelle adjudication. En un tel cas, qui arrive souvent, le plus sûr est de faire condamner les Opposants de rapporter le prix qu'ils ont touché, pour être rendu à l'adjudicataire, *lequel, outre ce que nous venons de dire, peut faire condamner le poursuivant en criées, à lui restituer ce qui aura tourné en frais de justice et d'ordre, et ce qui défaudra du prix, et en* TOUS SES DÉPENS, DOMMAGES ET INTÉRÊTS." Lachaize, *Expropriation forcée*, t. 1, p. 239, n° 215 : " Quand la loi a obligé le poursuivant de faire insérer dans le procès-verbal de saisie immobilière la contenance au moins approximative de chaque pièce saisie, elle a eu un but ; c'est de faire connaître d'une manière à peu près exacte la valeur des objets saisis, parce que cette valeur se calcule nécessairement sur l'étendue dont se composent ces objets." Duvergier, t. 1, p. 361, n° 300 : *Idem*, t. 1, p. 418, n° 347 : " En admettant l'action en garantie contre le saisi, j'ai indiqué les motifs qui ne permettent pas de l'exercer contre le poursuivant : le saisi est un vendeur, ou du moins il doit lui être assimilé ; la position du poursuivant repousse au contraire l'assimilation. Toutefois, si l'action en garantie qui naît de la vente ne peut être intentée contre le créancier qui, pour obtenir son paiement, a poursuivi l'expropriation de son débiteur ; *ce créancier reste sous la responsabilité de sa faute s'il a compris dans la saisie quelques portions de biens qui n'appartenaient pas à son débiteur ; lorsque cette erreur ne peut être attribuée qu'à sa légèreté ou à*

sa négligence, et qu'il n'a point de justification dans des actes par lesquels le saisi se serait fait considérer comme propriétaire. Idem, p. 419, n° 348. " On sait que l'obligation de garantie produit non-seulement une action, mais aussi une exception. L'exception, peut-être opposée à tout Demandeur en revendication, qui est en même temps successeur, à titre universel, du vendeur ; ce qui comprend l'héritier légitime, le légataire universel, et le légataire à titre universel, par la raison qu'ils sont tenus personnellement des engagements de leur auteur." *Idem*, p. 426, n° 354, *in fine*. " En termes généraux, lorsque celui qui a le droit de revendiquer, est en même temps tenu de l'obligation de garantir, le droit et l'obligation s'annullent réciproquement."

Moyens de l'Intimé : This appeal has evidently originated in a misunderstanding of the meaning of certain forms of expression, influenced, probably, by the want of accuracy in the use of words in drawing the deed upon which Appellant's opposition is founded. It is proved, as well by the authentic deeds filed by Respondent, as by the witnesses examined by Appellant, that John Greene and Lucy Bissel his wife, were, so far as the parties here are concerned, the original owners *par indivis* of the south half of the tract of land spoken of in this case as lots n°s 17 and 18 of the first range of the seigniory of Foucault or Allard's manor. It also appears by said authentic deeds, that, on the 12th March, 1856. Greene and wife sold and transferred said south half of said tract, to wit : one equal undivided half of said south half to Jacob Young the third, and the other equal undivided half thereof to Lucy Adela Reynolds his wife ; and thus Young and his wife became proprietors *par indivis* of the *whole* of said south half of said two lots n°s 17 and 18, giving by said deeds to Greene and wife an hypotheque upon their respective *undivided* halves, for the balance of the purchased money. Greene, having been named tutor to the minor children of himself and his wife after her death, he afterwards, on the 20th January, 1858, by authentic deed of transfer, assigned to Respondent the balance due him, upon said sales, by Young and his wife, and that she, Lucy Adela Reynolds, having failed to pay the instalments so assigned as against her to Respondent, the latter sued her in the Circuit Court for the district of Bedford, upon said assignment. And, having recovered judgment against *her*, on the 8th July, 1859. sued out his writ of execution against *her* " lands and tenements," and, in virtue of which, David Brown, sheriff " did seize and take in execution as belonging to her " *the equal undivided half of the south half of a certain tract of land known as lots n°s 17 and 18 of the first range of Foucault or Allard's manor*, as stated in sheriff's deed on

which Appellant founds his opposition, and bounded as therein specified, and evidently the same *undivided half* of said south half, by her purchased from Greene. And, having advertised, said sheriff, on the 14th December, 1859, at the parish of St. Thomas, in said district, sold, under said writ, to Pierre Doutre, then of Montreal, advocate, the *undivided half* of the south half of said tract of land, composed said whole tract of Lots Nos. 17 and 18, for the price stated in Sheriff's deed. That is, Lucy Adela Reynolds' *undivided half* of the south half of said Lots 17 and 18 which she owned and held *par indivis* with her husband Young, was sold to Pierre Doutre, in satisfaction of Respondent's judgment against *her*, recovered as aforesaid. And that *her undivided half, only*, of said south half of said two lots was taken in execution and sold as aforesaid to Pierre Doutre, appears, not only by said Sheriff's declaration in said deed as to what he seized on said judgment, but also by Opposant's opposition itself, in which it is expressly stated that said Sheriff, under said writ, took in execution only "*the equal undivided half of the south half* of a certain tract of land known as Lots Nos 17 and 18 of the first range above described." And it is not pretended by Opposant that said Sheriff conveyed to Doutre, more land than he seized and advertised for sale under said writ. Nor could Pierre Doutre, nor Appellant *es qual.*, claim by the opposition in question, more than was seized in execution under said writ: yet it is definitely stated by the Sheriff that he took in execution *only the undivided half of the south half*, to wit: the undivided quarter of Lots Nos 17 and 18; nor can the Opposant pretend that he acquired more, under said Sheriff's sale, than an undivided quarter of the said two lots, to be taken out of the south half thereof by subsequent partition or division between him and Jacob Young, or whoever might become the owner of Young's undivided half of said south half, purchased as aforesaid from Greene by him. How much land Doutre sold to David Clarke, or that he was obliged to institute an action to rescind the sale, as stated in said opposition, has, it is respectfully submitted, nothing to do with the question now before the Court; nor is Respondent in anywise bound by such "*res inter alios acta*," nor has he anything to do with the matters referred to in Opposant's special answers, nor the opinions of said Sheriff therein referred to, in the matter of "*Ira Taylor* vs. *Jacob Young*, the third." this being also *res inter alios*, &c., and wholy foreign to the issue in this case. The simple question in this Appeal is, what land, or rather what *right* in or to land did Doutre acquire under the Sheriff's deed? Did he acquire a "*corps certain?*" Any exact number of acres? Any distinct separate and specified piece of land

or only the *equal undivided half of the south half* of the said tract of land known as lots Nos 17 and 18 aforesaid? The Sheriff could legally sell only what he seized under the Writ against Lucy Adela Reynolds, and it is expressly stated in said opposition, as well as in said Deed to Doutre, that the Sheriff took in execution *only the equal undivided half of the south half, &c.*, as above stated, that is, the property acquired by her from Greene, nor could he sell more than he so seized, whatever ambiguity may exist in the phraseology of the deed to Doutre. From the survey of Lindal Corey, of Record, mutually named by the parties, and which determines the contents of the *two* lots, Nos 17 and 18 to be only 104 acres, it is evident that the undivided half of the south half thereof could not possibly contain 49 acres, ½ rod and 12 perches, as erroneously stated by way of *description* in said deed to Doutre; and that Opposant has been misled in this case by a grammatical error in referring the *contents*, as stated in said deed. to the undivided half of the south half sold to Doutre, instead of to the *whole* south half of said two lots, is obvious. Respondent submits that Opposant is bound by the material allegations of his Opposition, as well as the evident intention of all interested, and that the Sheriff seized and sold to Doutre only, Lucy Adela Reynold's rights in south half of said two lots, to wit: the *equal undivided half of the south half* thereof by her purchased from Greene, and that her husband, Jacob Young, third, remained the owner of the other undivided half of said south half, which he afterwards sold to John B. Reynolds, Defendant, without having paid up his instalments, and that Respondent, under the transfer to him by John Greene above referred to of said instalments, sued John B. Reynolds, as *Tiers détenteur* of Jacob Young's said equal undivided half of the south half of said tract of land Nos 17 and 18, and said latter undivided half is now under the seizure opposed in this cause. Respondent submits that it is plain from the wording of the Sheriff's deed, relied upon by Opposant, as well as from the allegations of his opposition founded thereon, that Doutre acquired only, and could acquire under the seizure from which he derives title only, "the equal undivided half of the south half" of said lots, be the contents of his acquisition what they may. That from the contents, 104 acres, of the whole of said two Lots, as established by Corey, Provincial Land Surveyor, it is impossible that the interest in the south half thereof, taken under the execution from which Opposant claims title, could be of the extent of 49 acres ½ rod and 12 perches. The contents are mentioned as referring to the whole, and not to the half of said south half are vaguely *descriptive only*. If Appellant's pretensions were cor-

rect, then Jacob Young's undivided south half, acquired from Greene as above, was sold under an execution against Lucy Adela Reynolds, and that too without giving Young any notice of opportunity of saving his property by opposition, the advertisement of the sale having been evidently from the wording of the Sheriff's deed to Pierre Doutre of "*the equal undivided half of the south half, &c., of the lands and tenements of Lucy Adela Reynolds.*" The property taken under the execution from which Opposant claims title, is definitely specified, and the allegations that it consists of so many acres *more or less*, is no reason for despoiling the neighbouring proprietor, whatever claim it may give the purchaser to a reduction in price in case of deficiency in area.

BERTHELOT, J. A.: Par acte de vente du 13 Mars, 1856, Tremblay, Notaire, en la paroisse de St. Thomas, John Greene et sa femme, Lucy Bissell, ont vendu à *Jacob Young the Third*, "the equal undivided half of the "south half of a certain tract of land, known as Nos 17 "and 18 of 1st range of Foucault or Allard's Manor, boun-"ded the whole of said tract, to the south, by lot No. "16, to the north by lot No 19, towards the west by the "River Richelieu, and towards the east by lot No. 38, in the "second range and by other lots in said second concession, "containing said undivided half of said south half of said lots, "49 acres, half a rod and 12 perches in superficies, more or less, "with also all the buildings erected on said undivided pieces "or parcels of land and premises." Par acte du même jour, Greene et sa femme, ont vendu à Lucy Adela Reynolds femme de Jacob Young the Third, l'autre moitié indivise de la moitié sud du dit morceau de terre connu sous les nos 17 et 18, et entièrement désignés de la même manière. Il est évident, d'après ces deux actes passés le même jour, devant le même notaire, que Jacob Young *the Third*, le mari, et Lucy Adela Reynolds, sa femme, n'ont acquis chacun que *moitié indivise* de la moitié sud des lots 17 et 18 au 1er rang de Foucault c.-à-d. ¼ du total. Greene, tant en son nom que comme tuteur aux enfants nés de son mariage avec sa femme Bissell, a transporté, par acte devant Belle- notaire, du 20 janvier, 1858, à W. Elvidge, l'Intimé, $750, dues comme balance sur chacun des deux prix de ventes du 12 mars 1856, faites au dit Young *the Third* et Adela Reynolds, et dus par chacun d'eux séparément. Le 14 décembre, 1859, Pierre Doutre, représenté aujourd'hui par l'Appelant, est devenu adjudicataire, à la vente par décret qui en fut faite ce jour là, à la porte de l'église St. Thomas, par le shérif du district de Bedford, en vertu d'un writ d'exécution à la poursuite de l'Intimé Elvidge, contre "*the lands and tenements*" of Lucy Adela Reynolds "wife of Jacob Young *the Third*." d'un im-

meuble désigné dans le titre du shérif Doutre, comme suit: " The equal undivided half of the south half of a certain tract " of land known as lots nos 17 and 18 of the first rangs of " Foucault, or Allard's Mannor, bounded the whole of the said " tract as follows: towards the north, by lot No 19, to the " south, by lot No 16, towards the west, by the river Richelieu, " and towards the east, by lot No 38 in the second concession. " and by other lots in the said second concession, containing " said undivided half of said south half of said lots, 49 acres, " half a rod and 12 perches in superficies, more or less, with " also all the buildings that may stand erected on said undi- " vided piece or parcel of land and premises." Doutre n'a pu acquérir au décret que la même quantité de terrain que celle qui était en la possession de la femme Adela Reynolds sur qui le décret avait lieu : or cette quantité était la moitié indivise de la moitié sud des lots Nos. 17 et 18 au 1er rang de Foucault, ainsi qu'il a été mentionné ci-dessus. Il est bien vrai qu'il est dit dans la désignation " containing said undivided half of " said south half of said lots 49 acres, half a rod and 12 perches " mais cette expression, quant à la contenance, ne peut être prise comme une garantie que ce qui était vendu contenait 49 acres, parce que la vente n'était pas faite à la mesure ou à la quantité, mais bien seulement d'une certaine portion des lots Nos 17 et 18 c'est-à-dire, de la moitié indivis de la moitié sud des dits lots, rien de plus. J'avoue que la désignation est assez vicieuse, et qu'elle a pu faire tomber l'adjudicataire en erreur sur la quantité qui lui était adjugée, mais il ne peut y être remédié par la procédure que l'Appelant a adoptée, et c'est bien malheureux pour lui sans doute. C'est en vain que l'Opposant (l'Appelant) prétend qu'il a droit de se pourvoir contre le Demandeur actuel pour l'insuffisance de ce qui lui a été livré par suite du décret du 14 de décembre 1859. C'était à lui à voir ce qu'il achetait et ce qu'il pouvait acheter, ou ce qui pouvait être vendu par un décret fait sur la femme Reynolds, qui ne pouvait être expropriée que de ce dont elle était devenue propriétaire, par l'acte du 12 mars, 1859. Si sa prétention de dire qu'il a acheté 49 arpents est bien fondée, il aurait dû se pourvoir par opposition sur les deniers pour demander la diminution de son prix d'adjudication, proportionnellement, à raison de ce qui ne pouvait lui être livré ; (1) ou encore il pourrait se pourvoir contre ceux à qui les deniers ont été accordés par le jugement de distribution. Il n'a eu recours à aucun de ces moyens qui paraissent les seuls qu'il avait et qu'il a peut-être encore, si toutefois il peut établir que la désignation de ce qu'il

(1) 2 *R. J. R. Q.*, p. 148. The sale of an estate, by decret, for more in quantity than it contains, entitles the purchaser to a diminution of the price, but does not annul the same, *Gray* vs. *Todd* and *Usborne*.

a acheté comportait une garantie de contenance, ce que je ne crois pas. L'erreur par suite de laquelle l'Opposant souffre, remonte à la désignation donnée lors de la vente du 12 mars, 1858, mais je ne puis aucunement voir comment il peut y remédier en vertu de son opposition afin de distraire, par laquelle il prétend qu'en vertu de la vente par décret du 14 décembre, 1859, il a droit de réclamer, comme adjudicataire, l'autre moitié indivise de la moitié sud des lots 17 et 18 ; laquelle moitié est maintenant sous saisie sur le nommé Reynolds, propriétaire de cette autre moitié indivise qui avait été vendue le 12 mars 1856, à Jacob Young *the Third*, le mari de Adela Reynolds, sur laquelle la vente par décret du 14 décembre a eu lieu. Selon ce qui a été décidé par cette cour, le 31 mai, 1860, dans la cause de *Desjardins* contre *La Banque du Peuple*, (7 *R. J. R. Q.*, p. 135 et 139,) aussi bien qu'au jugement rendu par cette cour le 16 mars 1863, dans la cause de *Brown* et *Jackson*, l'Opposant ne peut réussir sur la présente opposition. Le jugement, dans la première de ces causes, a consacré le principe qu'un adjudicataire, en pareil cas, devait se pourvoir par action contre ceux qui ont touché les deniers, et c'est ce que l'Opposant aurait dû faire, si ayant réellement acheté la moitié des lots, 17 et 18, il n'a pu se faire livrer qu'un quart d'iceux. Selon ce qui a été décidé dans la seconde cause, où il s'agissait aussi d'une erreur dans la désignation, on peut lui dire que la description donnée ne comporte pas la vente de la moitié des lots mais bien seulement du quart d'iceux, étant ce qui avait été acheté et appartenait à Adela Reynolds, et qu'il y avait eu erreur évidente dans la dernière partie de la désignation. Et l'Appelant serait donc sans autre recours que celui qui peut lui résulter de l'erreur dans laquelle il est tombé par suite d'une désignation vicieuse. Mais ce n'est pas par une opposition afin de distraire qu'il pouvait se pourvoir. Je ne vois pas que les autorités de l'Appelant justifient la procédure qu'il a adoptée, et il faut toujours en revenir à considérer la question comme je l'ai ci-dessus exprimée. Le jugement devra donc être confirmé pour les motifs qui se trouvent dans le jugement de cette cour, le jugement de la Cour Supérieure que nous confirmons n'en contenant aucun.

MONDELET, J. : Je ne vois aucune difficulté dans cette cause. Quelle qu'ait été l'erreur de la désignation quant au nombre d'arpents, lors du décret, il est parfaitement évident que Pierre Doutre n'a acquis et ne pouvait acquérir que " the equal undivided half of the south half of a certain tract of land known as lots numbered seventeen and eighteen of the first range of Foucault or Allard's Mannor." Ainsi, qu'il fût dit ou non que cette moitié avait " 49 acres, half a rod and 12 perches in superficies" et cela s'y trouve, il ne pouvait

toujours y avoir que ce que l'arpenteur a constaté être, savoir : 104 arpents formant les deux lots, 49 arpents, ½ rod et 12 perches pour moitié, et, tout au plus, 24 arpents et quelque chose en sus pour la part de Doutre puisque c'est la moitié indivise de la moitié sud des lots 17 et 18. Le shérif n'a pu, par une erreur, faire que ce qui n'a que 24 arpents en ait 49, et Doutre, en devenant l'acquéreur de la moitié de la moitié des 104 arpens, n'a pas pu acquérir 49 ! Non, la chose est évidente, Doutre n'a acquis que ce qui réellement était saisi et vendu par décret. Cette cour ne peut non plus effectuer une impossibilité et encore moins affirmer une fausseté, ce qui serait le cas, si elle décidait dans le sens de l'Opposant, l'Appelant, qu'elle ne peut, sans blesser la vérité, déclarer être le propriétaire d'une étendue de 49 arpents ; c'est hors de question. Il n'appartient pas à cette cour, d'indiquer à l'Opposant, qui d'ailleurs peut le faire sans secours étranger, la marche qu'il doit suivre pour se faire rendre justice, mais elle doit déclarer, que, dans l'instance telle qu'elle se présente ici, elle ne peut aucunement agir dans le sens de l'Opposition. Le principe consacré par cette cour, dans la cause de *Desjardins* vs. *La Banque du Peuple*, quant à la garantie du décret, par le Demandeur, ne peut en rien aider l'Opposant ici ; la question n'est pas la même. Le jugement de la cour de première instance (lequel n'est pas motivé) doit être confirmé. Il me semble qu'il eût été convenable que la cour de première instance assignât quelque motif pour faire connaître le principe qui servait de base à son jugement. Je pense que la Cour d'Appel doit motiver son jugement, et elle le fait.

" LA COUR : Considérant que, par la vente par décret du 12 décembre 1859, qui a eu lieu sur Lucy Adela Reynolds, par le shérif du district de Bedford, Pierre Doutre, représenté par l'Opposant, ès qualité, n'a pu devenir acquéreur et adjudicataire que de ce dont Lucy Adela Reynolds était alors propriétaire, en possession, c'est-à-dire, de la moitié indivise de la moitié snd des lots numéros 17 et 18, au premier rang de Foucault ou " Allard's Manor " et qu'elle avait acquise par acte de vente du 12 mars, 1856, reçu devant Tremblay et son confrère, notaires, de John Greene et de son épouse, laquelle moitié indivise est du quart du total des dits biens, et rien de plus ; Considérant que, pour ces raisons, il n'y a pas d'erreur dans le jugement rendu par la Cour Supérieure pour le district de Bedford, siégeant à Nelsonville, le 13 octobre 1862, a confirmé et confirme le dit jugement. (7 *J.*, p. 257.)

CHARLES DAOUST, pour l'Appelant.

MARCUS DOHERTY, pour l'Intimé.

RENTE CONSTITUEE.—DECRET.—PRESCRIPTION.—HYPOTHEQUE.

COUR SUPÉRIEURE, Montréal, 23 février 1863.

Coram MONK, J. A.

TURCOTTE *vs.* PAPANS et al.

Jugé: Que la vente par décret d'une rente constituée n'a opéré aucune novation de cette rente et n'a pas eu l'effet d'en changer la nature; que les propriétaires par indivis de l'héritage hypothéqué au paiement des arrérages de cette rente qui sont indivisibles; sont tenus solidairement au paiement de ces arrérages.

Les Demandeurs réclamaient des Défendeurs en possession comme propriétaires par indivis d'une terre affectée au paiement d'une rente constituée la somme de £60, pour arrérages de cette rente depuis le 9 mai 1837, à venir au 9 mai 1862, et résultant de l'acte de vente consenti par Benjamin Berthelet à Louis Papans, père des Défenderesses et ses donataires, le 14 avril 1836. Les Défenderesses plaidèrent la prescription de cinq ans, et firent des offres pour les arrérages des dernières cinq années, et, de plus, elles prétendirent que la nature de cette vente avait été innovée par le décret pui en avait été fait le 7 janvier 1842, et que, dans tous les cas, par suite de cette novation, la prescription de cinq ans s'appliquait à l'encontre des arrérages de cette rente.

MONK, J.: This is an action instituted to recover arrears of *rente constituée.* On the 14th of April, 1836, Benjamin Berthelet, sold a farm to Louis Papans, for the sum of £50, whereof £10 was paid down, and for the balance £40, an annual constituted rent of £2 8s. was stipulated to be paid. In the course of the same year, Papans made a donation of this property to his two daughters, then minors, the Defendants in this cause. By the deed of donation, passed on the 17th May, 1836, the daughters agreed to pay the constituted rent. In 1842, the circumstances of Berthelet, the original proprietor, became embarrassed, and judgment being obtained against him, the *rente constituée* above-mentioned, on the 7th June, was sold, together with all arrears. At a subsequent period, the purchaser transferred the *rente* to one Désilets, at the same time, making over all the arrears due by the minor children. When the minors had attained the age of majority they ratified the deed of donation. The representatives of Desilets now brought the present action for the arrears accrued, stating that Defendants were still in possesion, and had been in possession since the day of ratification. The claim was resisted by Defendants, principally on the ground that the prescription of five years applied to the arrears sought to be recovered, and that Plaintiff's claim could therefore extend

only to five year's arrears. Defendants have adduced the authority of Duranton and several others to prove that a novation had taken place in consequence of the sale of the property. But, notwithstanding these authorities, the Court is of opinion that no novation has taken place. It was shown that the property was alienated by a deed of sale, that part was paid down, and the remainder was made *rente constituée.* No doubt therefore exists as to the prescription. The *rente* was established for the price of an immovable and not as a *rente* for the alienation of a *capital ;* and the court has always been of opinion that the prescription of five years did not apply to *rentes* resulting from the alienation of an immovable property, but only to those established for the alienation of a *capital.* (1) The five years prescription did not, therefore, apply. Pothier, it is true, seemed to differ, but Pothier had doubts, and where this was the case, we might readily have recourse to other authorities, and these authories went to prove that only the prescription of 30 years would apply in the present case. It had been contended, on the part of Defendant that they were entirely ignorant of the nature of the title to the property which had been donated to them, and therefore, so far as they were concerned, the *rente* became an ordinary *rente constituée à prix d'argent,* by the alienation of a capital. But, unfortunately for this pretension, particular reference was made to this very point in the deed of donation, and the matter was so explicitly stated, that they were found to be informed that the *rente* was one constituted by the alienation of an immovable, and, therefore, not subject to the five year's prescription. Again, it was alleged by Defendants that the Sheriff of Montreal sold this property, and, thence, it was pretended that whatever the original character of the *rente,* it then fell into the class of ordinary *rentes constituées.* But the court see no reason to believe that any change had been made in the character of the *rente* by the Sheriff's sale, so as to alter the prescription to one of five years. The court might be disposed to characterize the *rente* as Defendants had characterized it, if it rested upon the three latter deeds only, namely, the deed of donation, the Sheriff's sale, and the transfer; but, in fact, it rested not only upon these, but also upon the particular title by which the rent was constituted. The court now come to the point as to whether Plaintiff has made out his title. There seemed to be no difficulty about this. But another question arose. Were these Defendants to be considered in possession of the property from the day of donation? They were of

(1) V. art. 2250 C. C.

very tender age when the donation was made, but having subsequently ratified it on attaining the age of majority, the question must be answered in the affirmative. Lastly, it was said that the action was wrongly brought, inasmuch as it was directed against them jointly and severally. But the court is of opinion that though it is a personal action, Defendants must be condemned jointly and severally to pay the arrears, inasmuch as they possess the land *par indivis*.

"La cour considérant que, par l'acte de vente consenti par Berthelet mentionné dans les plaidoyers produits en cette cause à Louis Papans, en date du quatorze avril 1836, une rente constituée de deux louis huit chelins par année, sur un capital de quarante louis, fut établie en faveur de Benjamin Berthelet, le Vendeur: considérant que cette rente annuelle était ainsi constituée pour le prix d'un immeuble et non une rente pour l'aliénation d'un capital; considérant que cette rente ainsi constituée est régie non pas par des principes qui régissent les rentes établies pour l'aliénation d'un capital, mais par ceux, qui régissent les rentes résultantes de l'aliénation d'un héritage. Vu que par la donation faite et consentie par L. Papans de l'immeuble ainsi acheté de Benjamin Berthelet à ses deux filles, les Défenderesses en cette cause, en date du dix-sept mai 1836, la nature et le montant de la rente étaient déclarés, et que les Défenderesses agissant de la manière mentionnée dans l'acte de donation ont accepté la donation et qu'elles se sont obligées de payer la rente constituée, telle que mentionnée dans l'acte de vente; Considérant que, par la ratification de la donation par les Défenderesses, en date du premier septembre 1857, les Défenderesses doivent être, et sont censées avoir été en possession de la terre désignée dans la déclaration, depuis le dix-sept mai 1836, la date de la donation consentie en leur faveur par leur père, Alexandre Louis Papans; considérant que la vente de la rente constituée par le Shérif du district de Montréal, le sept janvier 1842, n'a opéré aucune novation de la rente ou aucunement changé la nature de la rente, soit à l'égard des Défenderesses, soit à l'égard de l'acheteur de la rente; considérant qu'il résulte de la preuve produite en cette cause que cette action est bâsée non-seulement sur l'acte de donation du dix-sept mai 1836, la vente par le Shérif du sept janvier 1842, et le transport du seize décembre 1841, mais aussi sur l'acte de vente du quatorze avril 1836; considérant, de plus, que, pour les arrérages de rente constituée pour l'aliénation et pour le prix d'un héritage, la prescription de cinq ans invoquée et plaidée par les Défendeurs ne s'applique pas d'après nos lois, et que la prescription de trente ans seulement s'applique. Vu que, dans les circonstances de cette cause ci-haut constatée,

les offres faites par les Défenderesses dans les exceptions en premier lieu plaidées par les Défenderesses ne sont pas suffisantes; considérant que les Défenderesses ont accepté la donation à elles faite par Alexandre Louis Papans, en date du dix-sept mai 1836 et l'ont ratifiée à leur âge de majorité, se sont par leurs actes légalement faits et consentis, rendues responsables en droit pour le paiement de tous les arrérages réclamés par les Demandeurs ; considérant qu'elles sont responsables solidairement pour le paiement des arrérages, en autant qu'elles possèdent la terre par indivis comme propriétaires d'icelle, et que, dans les circonstances de cette cause, les arrérages d'icelle qui en résultent sont indivisibles quant aux Défenderesses; Considérant que, partant, les offres faites par les Défenderesses, dans leur exception en second lieu plaidée, ne sont pas légales ou suffisantes, a débouté et déboute les deux exceptions ainsi plaidées par les Défenderesses à l'encontre de la présente action ; procédant à juger sur le mérite de cette cause, considérant que les Demandeurs ont prouvé par une preuve légale et suffisante les allégués essentiels de leur déclaration, la cour maintient l'action et demande des Demandeurs, et condamne les Défenderesses, conjointement et solidairement, à payer aux Demandeurs la somme de soixante louis pour arrérages, calculés depuis le neuf mai 1837, jusqu'au neuf mai 1862, de la rente mentionnée dans la déclaration (7 *J.*, p. 272).

BELLE, avocat du Demandeur.

DOUTRE and DAOUST, avocats des Défenderesses.

RENTE CONSTITUEE.—PRESCRIPTION.—HYPOTHEQUE.

BANC DE LA REINE, EN APPEL, Montréal, 4 juin 1864.

Présents : DUVAL, Juge-en-Chef, MEREDITH, MONDELET et BADGLEY, Juges.

PAPPANS et al, Appelantes, *et* TURCOTTE et ux., Intimés.

Jugé : 1° Que la prescription de cinq ans n'a pas lieu pour les arrérages d'une rente constituée par acte de vente comme représentant le prix de l'immeuble vendu. (1)

2° Que sur action *personnelle* pour arrérages de telle rente, contre des héritiers possédant par indivis, la condamnation ne peut être solidaire. (2)

3° Que, dans l'espèce, il y a lieu à l'action personnelle, sur obligation par donataires de payer une rente constituée en faveur de l'auteur duquel le donateur avait acquis l'immeuble.

(1) V. art. 1787 et 2250 C. C.

(2) V. art 1103, 1122 et 2017 C. C.

Le jugement de la cour de première instance est rapporté ci-dessus p. 155.

DOUTRE, C. R., pour les Appelantes : La présente action étant *personnelle* et non hypothécaire, elle ne peut avoir d'autre base que les faits ou engagements personnels des Appelantes, avec lesquelles il faut montrer un lien personnel de droit, et non un simple droit hypothécaire. Le lien de droit ne pouvant être autre que l'acceptation de la donation du 17 mai 1836, par l'aïeule des Appelantes, et la ratification de ces dernières du 12 septembre 1857 ; il faut trouver dans ces deux actes, et non ailleurs. l'obligation de payer cette rente constituée, *comme prix d'un immeuble* pour repousser la prescription de cinq ans, invoquée par les Appelantes. Ni l'un ni l'autre de ces deux actes ne reconnaît à la rente en question le caractère de représenter le prix d'un immeuble. Toute rente constituée est censée légalement constituée à prix d'argent, s'il n'appert pas du contraire. (1) Quoique plusieurs auteurs, et entr'autres Pothier (2) soient d'opinion que les arrérages de la rente constituée, pour le prix d'un immeuble, soient prescriptibles par cinq ans, il n'y a pas de doute qu'ils le soient lorsque la rente est constituée à prix d'argent, (3) et cette prescription est absolue. Quelque système que l'on adopte, savoir : soit que l'on considère cette rente comme ayant été constituée pour prix d'un immeuble, ou à prix d'argent, l'obligation d'en payer les arrérages est divisible et devait être adjugée comme telle contre les Appelantes. (4) Les Intimés remontent, dans leur déclaration, jusqu'à l'acte constitutif de la rente savoir : la vente par Benjamin Berthelet à Alexandre L. Pappans, en date du 14 avril 1836, à la vente du shérif du capital de cette même rente, en date du 25 mai 1841, à Olivier Berthelet ; à un transport de ce dernier à L. E. Désilets, en date du 16 décembre 1841, enfin aux différents actes qui ont transmis un titre aux Intimés. L'énumération d'une partie de ces actes, sinon de tous, était nécessaire pour établir le droit des Intimés à réclamer les arrérages de cette rente, mais l'action étant *personnelle* contre les Appelantes, il ne ressort de ces actes aucun lien qui puisse personnellement lier les Appelantes. Toutefois, il est évident que cette énonciation du titre primordial a eu l'effet de préjuger l'opinion de la Cour Inférieure sur le caractère de la rente, et à faire envisager cette rente comme représentant le prix d'un immeuble. S'il fallait discuter ce préjugé, on verrait que, dans

(1) Pothier, *Constitution de rente*,, n° 166.

(2) *Idem*, n° 138.

(3) *Idem*, n° 133.

(4) *Idem*, n° 120.

le cas même où le capital de cette rente pourrait être considéré comme ayant été originairement le prix d'un immeuble, elle en perd le caractère, dans l'acte même qui la constitue. Dans ce titre le prix de l'immeuble est £50, dont £10 payés comptant, et "*as to the remaining sum of* £40, *the purchaser shall* "*retain it in his hands, à titre de constitut, at an annual* "*rent of* £2 8 0." Une rente ainsi constituée est réputée l'être à prix d'argent, ainsi que l'établissent les auteurs qui ont traité cette matière. (1) Mais les Appelantes réitèrent l'assertion que l'action étant personnelle, et non hypothécaire, il est oiseux de remonter à la vente par Benjamin Berthelet à Alex. Pappans, en date du 14 avril 1836, attendu que cet acte n'a pu créer qu'un préjugé dans la cause, et ne pouvait servir de titre aux intimés contre les Appelantes. L'action personnelle ne pouvait reposer sur d'autres titres que les actes où les Appelantes avaient parlé, savoir: la donation du 17 mai, 1836, et la ratification du 12 septembre, 1857. Voici tout ce que contient la donation relativement à la rente: "Appartenant le susdit lot "de terre au dit A. L. Pappans, pour l'avoir acquis de Benja-"min Berthelet, par contrat en date du 14 avril 1836, et "dont copie *sera remise* aux donataires, à demande. La pré-"sente donation ainsi faite à la charge de continuer de payer "pour et à l'acquit des donateurs une rente annuelle de £2 "8 0, au capital de £40, constituée en faveur de Benjamin "Berthelet, etc., jusqu'au rachat du sort principal d'icelle, ra-"chetable à volonté, ainsi qu'il est porté au contrat de vente "par Berthelet, à Pappans." Rien dans ce titre, le seul qui puisse appuyer l'action personnelle, n'indique le caractère de la rente, et en l'absence d'une telle indication, la rente doit être réputée constituée à prix d'argent, ainsi que le dit Pothier, au No 166, ci-dessus cité. Les Appelantes ne sont liées que par cet acte, et on voit que leur position leur donnait tous les droits d'opposer la prescription de cinq ans. Si du titre qui lie les Appelantes, on passe à l'examen de ceux des Intimés, là même on arrive à la conclusion que dans le cas où ils eussent adopté l'action hypothécaire, ils n'auraient aucun titre pour démontrer que la rente fut constituée pour le prix d'un immeuble. La vente par Benjamin Berthelet à A. L. Pappans ne peut plus servir de titre aux Intimés. Comment ces derniers prétendent-ils remonter jusque-là ? Au moyen d'un transport que Olivier Berthelet a fait à M. Désilets, le 16 décembre 1841, après avoir acquis du Shérif, le 25 mai précédent, (1841). Les Intimés ne peuvent remonter au-delà du titre du Shérif, qui a solennellement consacré le caractère de la rente, dans les termes

(1) 4 Duranton, Nos 147 à 159, inclusivement; *Idem*, T. 12, No 303: 7 Toullier, Nos 280, 281, 305.

suivants. " *The capital sum of forty pounds currency, with interest or constituted annual redeemable rent,* à constitution de rente, *and the interest to become due thereon, upon the lot of land hereinafter described, to-wit, &c., the said lot belonging to Alexander L. Pappans.*" Ainsi nulle part, si ce n'est dans un titre qui n'a aucune valeur dans la cause, nulle part trouve-t-on cette rente comme représentant le prix d'un immeuble, à l'égard des appelantes.

BELLE, pour les Intimés : Les Appelantes ne peuvent soutenir que la rente constituée a changé de nature depuis sa création. L'acte de vente de B. Berthelet à A. L. Pappans, porte clairement constitution de rente pour le prix de la vente d'un immeuble. Or, la propriété affectée par cet acte n'a changé de mains qu'une fois, étant passée aux Appelantes par suite de la donation que leur père leur en a faite. Dans l'acte de donation pleinement confirmé et ratifié par les Appelantes depuis leur majorité, l'acte créatif de la rente est clairement indiqué. En outre, les Appelantes par cet acte s'obligent personnellement au paiement de la rente constituée, ainsi qu'il est porté au contrat de vente. Il n'y a donc pas eu, et il ne pouvait y avoir novation par le fait de ce changement de débiteurs. D'un autre côté, les changements de créanciers n'ont pas affaibli l'obligation des Appelantes ; toujours elle est passée de mains en mains avec tous ses caractères et dans toute son intégrité. Les Appelantes prétendent, dans leur première exception, que les Intimés font reposer leur action sur *l'acte de donation du* 17 *mai* 1836, *et sur la vente de la rente constituée par le shérif à Olivier Berthelet, et sur le transport d'icelle par ce dernier à L. E. Désilets.* Elles voudraient faire croire que les actes qui viennent d'être cités sont les seuls sur lesquels les Intimés basent leur action. Mais cette suppusition ne peut tenir en présence des faits réels. Les Intimés ont produit avec leur déclaration quatorze exhibits qui forment une chaîne sans solution de continuité. Il suffit de lire la déclaration des Intimés pour se convaincre que ces derniers sont remontés au titre créatif de la rente en question. Ils ont bien compris la nature de cette rente et ils n'ont rien négligé pour exposer leurs droits avec précision et avec clarté. Aussi, ont-ils répondu à cette erreur des Appelantes en les renvoyant purement et simplement à leur déclaration, et en disant qu'ils basaient leur action, non-seulement sur les actes mentionnés par les Appelantes dans cette exception, mais encore sur tous les autres actes par eux produits. Vient ensuite la question de la prescription. Les Appelantes invoquent la prescription de cinq ans établie par l'ordonnance de Louis XII, an 1510, article 71, contre les rentes constituées à prix d'argent. Les Intimés prétendent que cette prescrip-

tion n'est pas applicable dans le cas actuel. L'ancien droit français, qui nous régit, fait une grande distinction entre les les rentes constituées à prix d'argent et les rentes constituées pour raison de l'acquisition d'un héritage, soit que la rente ait été constituée comme prix, soit que le prix ait été d'abord spécifié et que la rente ait été constituée pour ce prix. Aux rentes constituées à prix d'argent, la prescription établie par l'Ordonnance est appliquée, mais il n'en est pas de même dans l'autre cas. Cette distinction n'est pas sans fondement : " Car," comme le dit M. Ferrière, " si la vente de l'héritage " avait été pure et simple pour une somme de deniers, le " vendeur pourrait demander à l'acheteur les intérêts de " ving-neuf années du prix ; parce qu'il n'est pas juste qu'il " jouisse du prix et de la chose qu'il a achetée et que le " vendeur soit privé de l'un et de l'autre." Dans tous les cas pour que les Intimés soient privés de leurs droits, il faut que la prescription soit clairement établie et se rapporte directement à la demande telle que formulée par eux. Or, les Intimés prétendent que l'Ordonnance précitée ne s'applique pas à leur action, et qu'à part de cette Ordonnance, il n'y a aucune loi formelle établissant une semblable prescription de cinq ans. Mais les Intimés vont plus loin. Ils ne croient pas se tromper en disant que dans le cas même où il y aurait un conflit entre les auteurs, la décision devrait être en leur faveur. Passant maintenant à un autre point de la défense, l'on demande si les Appelantes ne doivent être tenues des arrérages de la rente que depuis leur majorité, ou bien si les Intimés ont le droit d'exiger d'elles tous les arrérages non payés, à compter de la date de l'acte de donation. La seule raison donnée par les Appelantes à l'appui de leur prétention, c'est que les Appelantes ne sont en possession de la propriété affectée à la rente que depuis leur majorité. Mais l'acte de donation, qui est leur titre de propriété, les oblige à la prestation de la rente, à compter de mai 1837, et les Appelantes ont, depuis leur majorité, accepté et confirmé expressément cet acte de donation. Comment les Appelantes peuvent-elles donc être déchargées aujourd'hui d'une partie de leurs obligations ? Reste à savoir enfin, si les Appelantes doivent être condamnées solidairement. D'après l'acte de donation précité, les Appelantes sont tenues, chacune, au paiement de la rente constituée, sans division ni réserve. En outre, elles n'ont pas fait voir qu'elles possédaient divisément. Enfin, le fond étant hypothéqué à la rente, celle-ci est indivisible comme son hypothêque qui est indivisible.

MEREDITH, Justice : The action in the court below was for the arrears of a certain rent, from the 9th of May, 1837, to the 9th of May, 1862 ; and the plea of Defendants was pres-

cription, except as to the arrears for the last five years. It appears that, by a deed of sale, bearing date the 14th day of April, 1836, Benjamin Berthelet sold to Alexander L. Pappans, the father of Defendants, certain real estate, for £50, on account of which sum there was paid, at the time of the passing of the deed, £10, and as to the remainder of the purchase money, £40 (the deed of sale) contains the following covenant: "it has been agreed between the parties that the purchaser "shall retain it in his hands, *à titre de constitut*, at an annual "rent of £2 8 0, payable each and every year." A few days after the date of the deed of sale, on the 17th day of May, 1836, Alex. L. Pappans, who had so purchased the real estate, and his wife, made a donation of the same to their minor daughters, the Defendants, one of them being then only two, and the other nine years of age. The donation mentions that the real estate thereby given had been acquired by Alex. L. Pappans, the donor, from Benjamin Berthelet," par contrat en "date du 14 avril 1837, et dont copie sera remise aux donataires "à demande" and one of the conditions was," de continuer "de payer, pour et à l'acquit des donateurs, une rente annuelle "de deux livres huit chelins, au capital de £40, constituée en "faveur de B. Berthelet, payable etc., rachetable à volonté, "ainsi qu'il est porté au contrat de vente par Berthelet à Alex. Louis Pappans." The deed of donation was accepted by Louis Pappans, the grand-father of the minors, who agreed to cause it to be ratified by them, when they attained the age of majority; and Defendants, by an instrument bearing date the 1st day of September, 1857, accepted the deed of donation which had been so made in their favour, and acknowledged that, from the date of their majority, they had been possessed as proprietors of the real estate therein mentioned. This case brings two questions under our consideration. 1st, Is a constituted rent, representing the price of real estate, subject to the prescription of five years? and 2dly, Can the rent in question be considered as now representing real estate? Our courts have repeatedly, and, so far as I know, invariably, held that the prescription of five years cannot be taken advantage of, in cases such as the present; and the judgments so rendered are fully justified by the authorities on the subject. As to the second question, it is sufficient to observe that the donation which appellants have accepted refers, in two places, to the deed of sale creating the annual rent which they have undertaken to pay. They thus had ample means of ascertaining the nature of that rent; and, therefore, cannot be allowed to plead ignorance on the subject. There still remains a point in the case with respect to which it may be well to say a few words. The rent in question was sold, by the sheriff, under an

execution against Benjamin Berthelet, and adjudged to Olivier Berthelet, now represented by Respondents; and on the part of Appellants, it is contended that, in consequence of the manner in which the rent was sold, by the sheriff, Respondent cannot now derive any advantage from the fact that the rent in question originally represented the price of real estate. I cannot adopt this view. The sheriff sold the rent as it really existed, and the effect of the sale was to change, not the nature of the rent, but simply the ownership of it, by causing it to pass from Benjamin Berthelet, in whose favour it was created, to Olivier Berthelet, who became the *adjudicataire* of it. For these reasons, I am of opinion that the judgment of the court below ought to be confirmed as to the points above alluded to; but I agree with the other judges that the judgment must be modified in so far as it condemns the Appellants jointly and severally. The obligation sought to be enforced is clearly a divisible obligation; and the rule with respect to such obligations is: "qu'elles se divisent de plein droit entre les "créanciers stipulants et les détenteurs promettants." In the present case there was no joint and several undertaking; consequently, there was nothing to prevent the division of the debt by operation of law; and therefore the joint and several condemnation was wrong.

DUVAL, Juge-en-Chef: On a supposé que parce que les Défenderesses éteient propriétaires par indivis, elles devaient être condamnées solidairement. C'est une erreur."

MONDELET, Juge: Je suis d'avis que le jugement dont est appel, doit être confirmé pour les raisons suivantes: 1. L'article 71 de l'ordonnance de Louis XII, (1510), quant à la prescription des cinq dernières années d'une rente constituée à prix d'argent, ne peut s'appliquer ici, attendu que la rente constituée aux £40, balance due sur le prix de vente originaire, est une rente ou intérêt qui représente la jouissance et les fruits de l'immeuble vendu. Ce sont des intérêts sur un prix de vente. L'action repose sur tous les actes, et non uniquement sur la vente par le shérif. Je dois remarquer en passant, que bien que les avis de ceux qui ont commenté et interprété l'article 71 de l'ordonnance de 1510 soient discordants, toujours paraît-il assez constant qu'il y a, *au moins*, un doute. Dans ce cas-là, on ne doit pas, rigoureusement, priver de cinq années d'arrérages, ceux qui les réclament. Les prescriptions sont de droit étroit, et ne se peuvent établir par analogie. 2. Les intérêts doivent courir depuis mai, 1837, car l'acte de donation les oblige à les payer depuis cette époque. Or, comme les Appelantes, à leur âge de majorité, ont ratifié cet acte qui est leur titre, elles doivent les intérêts, aux termes de cet acte. 3. Quant à savoir si les Appelantes doivent être condamnées solidairement, on l'a

prétendu, car, a-t-on dit, elles ont possédé indivisément, et en ne faisant pas voir qu'il y a divison de paiement dans l'acte de donation, pas plus que division dans leur possession, il s'en suivrait qu'il ne peut y avoir pour elles aucun affranchissement de la solidarité. La réponse à cela me paraît être que l'action étant personnelle, et non hypothécaire, et les termes de de l'acte de donation n'établissant aucune solidarité, laquelle ne se présume pas, la condamnation doit être pure et simple. Ainsi, sous ce rapport, le jugement dont est appel doit être réformé, et confirmé quant au reste.

La Cour: Considérant qu'à l'exception de la partie du jugement dont est appel, rendu par la Cour Supérieure, siégeant à Montréal, le 23 février, 1863, qui condamne les Appelantes conjointement et solidairement, comme il y appert, il n'y a aucune erreur, cette Cour confirme le dit jugement, sauf et excepté quant à ce qui suit: Mais attendu que les Appelantes sont poursuivies personnellement, et non hypothécairement, et que leur responsabilité pour le paiement des arrérages de la rente dont est question n'est, aux termes de l'acte de donation du 17 mai, 1836, qu'individuelle, cette Cour, amendant à cet égard le jugement, et rendant le jugement que la Cour de première instance eût dû rendre, quant à ce, condamne les Appelantes, purement et simplement, et non solidairement, à payer aux Demandeurs la somme de £60, pour arrérages calculés depuis le 9 mai, 1837, jusqu'au 9 mai, 1862, de la rente mentionnée dans la déclaration des Demandeurs, lesquels arrérages sont réclamés par l'action des Demandeurs, avec intérêt sur la somme de £60, à compter du 23 février, 1863, jour du jugement. (15 *D. T. B. C.*, p. 153 et 8 *J.*, p. 152.)

DOUTRE et DAOUST, pour les Appelantes.

BELLE, pour les Intimés.

COMMUNAUTE DE BIENS.—PARTAGE.

COUR SUPÉRIEURE, Montréal, 30 mai 1863.

Coram MONK, J. A.

LEDUC *vs.* FORTIER.

Jugé: Que par suite d'un jugement de séparation de corps et de biens sur la contestation des droits et reprises matrimoniales de la femme, elle devra rembourser à son mari ou à ses créanciers le montant des dettes par lui acquittées sur un propre de sa femme, et que compensation aura lieu d'autant quant à ses reprises matrimoniales. (1)

Par le rapport du praticien, il appert que les dettes payées par le mari pour et à l'acquit de sa femme, sur et à raison de

(1) V. art. 1359 et 1365 C. C.

ses propres, dépassaient le montant des reprises de cette dernière en sorte qu'elle fut tenue à en rendre compte à son mari ou à ses créanciers.

" La cour, après avoir entendu la Demanderesse sur sa motion du vingt-sept de mai courant, et sur le rapport de J. A. Labadie, notaire, praticien nommé pour déterminer les droits et reprises de la Demanderesse séparée quant aux biens du Défendeur, Joseph Fortier, son mari, par jugement de cette cour, rendu le trente et un de mars 1863, le Défendeur n'ayant pas comparu lors de l'audition, avoir examiné le rapport et les pièces produites au soutien d'icelui, et nommément le contrat de mariage des parties passé devant C. D. Decelles, et son confrère, notaires, le quatorze de novembre 1851 ; vu la renonciation faite par la Demanderesse à la communauté de biens qui a existé entre elle et le Défendeur son mari, et vu le jugement du trente et un de mars dernier, et avoir, sur le tout, délibéré, accorde la motion, et a homologué le rapport pour être suivi et exécuté suivant sa forme et teneur, et réservant à la Demanderesse ses douaire et préciput mentionnés au rapport quand il y aura lieu ; déclare les droits, reprises et conventions matrimoniaux de la Demanderesse consister en ce qui suit : 1° en une terre, 2° en un emplacement, 3° en la somme de £50 0 2 montant de l'estimation des meubles et effets mobiliers contenus et énumérés en l'inventaire mentionné au rapport, les meubles et effets mobiliers donnés par dame Marie Martin dite Ladouceur au dit Joseph Fortier son gendre par l'acte de donation cité au rapport ; 4° En la somme de seize louis dix-neuf chelins et sept deniers montant des créances actives aussi contenues au dit inventaire, et données par Marie Martin dite Ladouceur au dit Joseph Fortier son gendre par le même acte de donation. Ces deux sommes réunies forment celle de £66, 19 9, mais cette dernière somme compensée avec celle de £90, 3 3, que le Défendeur a payée en l'acquit de Marie Martin dite Ladouceur, pour le montant des dettes passives et des frais funéraires portés au dit inventaire, aussi en considération du dit acte de donation ; laisse une balance en faveur du Défendeur de la somme de £23 3 6 que la Demanderesse devra rembourser et tenir compte au Défendeur ou à ses créanciers. Plus, la Demanderesse devra rembourser et tenir compte au Défendeur son mari, ou à ses créanciers, d'une autre somme de douze mille livres ancien cours, égale à £500, que le Défendeur a payée en l'acquit de Marie Martin dite Ladouceur, savoir : quatre mille livres dit ancien cours à Joseph Lecavalier et Marie Louise Leduc, son épouse ; quatre mille livres, même cours, à Jean Baptiste St. Germain et Mathilde Leduc son épouse, et quatre mille livres, même cours, à Pierre Falèse Leduc aux termes du dit acte de donation.

Donation £500 0 0, total à rembourser £523 3 6. Plus la Demanderesse devra remplir et exécuter à l'avenir envers dame Marie Martin dite Ladouceur sa mère, pendant sa vie durante, toute et chacune des charges et obligations auxquelles le Défendeur pourrait être tenu envers elle par le dit acte de de donation. (7 *J.*, p. 275.)

DRUMMOND et BÉLANGER, avocats de la Demanderesse.

LEBLANC et CASSIDY, avocats du Défendeur.

PRIVILEGE.—LOCATEUR.

CIRCUIT COURT, Quebec, 25th October, 1864.

Before TASCHEREAU, Justice.

GAGNON *vs.* HAYES.

Jugé: Que quoique le locateur ait un privilège pour ses loyers sur les effets garnissant les lieux loués, il ne peut exercer ce privilège par lui-même, il faut qu'il obtienne l'autorité de la Cour. (1)

The action was in revendication of certain effects which, Plaintiff alleged Defendant detained from him under the frivolous pretext that Plaintiff was indebted to Defendant, in the sum of twenty five dollars for rent. The Plaintiff, in his declaration, denied his indebtedness in that amount, and reiterated an offer which he had already made to give eight dollars in payment of all rent that might be due Defendant, concluding that the effects should be delivered up to him, and, in default thereof, praying judgment against Defendant for the sum of $91.00, the value of the effects revendicated, with the further sum of $20.00 for damages, and costs in any case.

TASCHEREAU, Justice: It is perfectly true that a landlord has a privilege for the payment of his rent upon all the effects garnishing the premises leased, but he cannot exercise this privilege himself, he must take the legal course and obtain the process of the Court. I can understand a landlord retaining furniture for a day or two, to obtain time to enforce or maintain the privilege which the law establishes in his favor, but, in this case, the effects were retained for a fortnight, and the Court cannot countenance such an arbitrary proceeding. Judment must therefore go in favor of Plaintiff.

Jugement: La Cour déclare le Demandeur le propriétaire des effets réclamés en cette cause, et vu que les dits effets ont été, depuis l'institution de la présente action, remis volontairement par le Défendeur au Demandeur, la Cour condamne le

(1) V. art. 1624, 1994 et 2005 C. C. et 873 C. P. C.

Défendeur à payer au Demandeur les frais de la présente action, comme d'une demande de $80.00. (15 *D. T. B. C.*, p. 170.)

CASAULT, LANGLOIS and ANGERS, for Plaintiff.

ANDREWS and ANDREWS, for Defendant.

HARBOR COMMISSIONERS OF MONTREAL.

SUPERIOR COURT, Montréal, 30th March, 1861.

Coram SMITH, J.

THE HARBOUR COMMISSIONERS OF MONTREAL *vs.* HALL *et al.*, THE SAME *vs.* LYMAN *et al.*

Held : That the Statute 16 Vic. cap. 24, extending the jurisdiction of the Harbour Commissioners westward to the little Saint-Pierre River, and giving them the control and management within the extent of the limits specified, does not thereby vest in them the proprietorship of the bed of the river, nor enable them to maintain petitory actions against *propriétaires riverains*, within their extended limits under allegations that *such propriétaires riverains* have encroached upon the bed of the River. (1)

That *propriétaires limitrophes* between whom no boundary has ever been fixed are not entitled the one to bring a petitory action against the other under pretext that there has been encroachment without first taking measures to establish the boundary between their respective properties.

SMITH, J. : These actions are each for the recovery of a piece of land, of which Plaintiffs allege that they are the proprietors, vested with the ownership and control thereof for the public, and on which Defendants are alleged to have trespassed and encroached, to the extent now claimed by Plaintiffs. Plaintiffs pretend that the land claimed forms part of the bed of the river, and has been encroached upon and usurped by Defendants, who are adjacent proprietors or lessees, under a *Bail Emphytéotique* or *Bail à longues années.* Defendants meet the actions by denying the alleged proprietorship of Plaintiffs and alleging that Defendants had acquired their respective properties by title from the Commissioners of Public Works appointed under the Statute 9 Vic. cap. 27, representing the Crown, by Deeds executed in March, 1851 ; that these Deeds gave them their rear boundary on the river, at medium high-water mark ; that, previous to the passing of the Statute 16 Vic., cap. 24, sanctioned on the 10th November, 1852, the Harbour of Montreal, under the control and management of the Harbour Commissioners, extended westward, only to the outlet of the Lachine Canal, but, by that Statute, it was extended further westward to the mouth of the Little River St.

(1) V. actes non compris dans *S. R. C.*, de 1886 et non rappelés ch. 61 s. 5.

Pierre ; the last mentioned statute being repealed by the 18 Vic. cap. 23, the same boundaries were still thereby declared as to the western limit of the Harbour; that these statutes had not divested Defendants of their title, under which they had always possessed to the river, and had never encroached or gone beyond medium high-water mark ; that Plaintiff's conclusions were vague and uncertain, that there never had been any boundary fixed between Defendants and the river to determine medium high-water mark, and if even an encroachment were to take place, no such actions as the present, could be maintained, without such boundary being first determined. A primary pretention of Defendants is, that Plaintiffs not being proprietors but, at the most, only Trustees for management, cannot bring a petitory action. Subsidiarily to this, they contend that there has actually been no trespass or encroachment. The first of these questions is that of the greatest importance, and has to be taken up before entering on any of the other grounds of defence, for, if the present be in the nature of petitory actions, of which it would seem, there is no doubt, unless Plaintiffs have the proprietorship of the land sought to be recovered, the actions cannot be maintained. The Statutes now in force, concerning the Harbour of Montreal, give Plaintiffs the control and management thereof, within certain limits therein specified. Apart from the particular property they are authorized to acquire by a process of expropriation mentioned in the statutes, the nature of their jurisdiction, within the limits which the Statutes give to the Harbour, would seem to be the keeping of order in the Harbour, the berthing of vessels, collection of the Harbour dues which they are authorized to impose, and the prevention of infractions of the statutes incorporating them, and of the rules and regulations which the statutes empower them to make. Plaintiffs are a corporation created by statute, and vested with no more or greater rights than are conferred upon them by the statutes constituting their charter. Previous to the passing of the 16 Vic. cap. 24, their jurisdiction westward was to the outlet of the Lachine Canal, nor does it appear that there was any express vesting of proprietorship in them within that boundary ; the terms of the enactments go no further than to confer upon them the control and management ; this language cannot be construed to convey to them proprietorship, but only such powers of control and management, as are necessarily incident to the regulation, government and improvement of the harbour, the objects for which they were created, and that strictly in the manner and within the express authority given them by these Statutes. The 16 Vic. conveyed no property generally, it created the

machinery for acquiring specific portions of property by arbitration; it gave to Plaintiffs control and management as they had previously had, extending that control and management to a larger area, but not the right of property within that area. By the law of the land, the bed of the river is vested in the Crown; to maintain title to any portion of it, it was incumbent on Plaintiffs to shew that they had a grant of it from the Crown, or that they have title to it by the Statutes on which they have relied. What authority then have they to wage the present actions? They assert that they have the control and management, but this is an argument *a priori*, and they must as well first shew that they are proprietors, and that their right of property is anterior to the possession of Defendants, of which they complain. If Defendants were in possession prior to the passing of the Statute 16 Vic. cap. 27, and that Statute conveyed no right of property to Plaintiffs, they cannot maintain the present actions. If even the Statute did convey title there would still be another difficulty in the way of Plaintiffs; the piece of ground sought to be recovered, cannot be said to have any certain locality, inasmuch as no boundary-line has ever been fixed between Defendant's property and the bed of the river; to which Plaintiffs now assert claims. I would hold, as I did in another case, that they being *propriétaires limitrophes* the one cannot maintain a petitory action against the other, until a boundary has been run, determining the line between them. It is unnecessary to go into the question as to whether there has been an actual encroachment, as the actions will be dismissed on the grounds already stated.

"The court considering that Plaintiffs have entirely failed to shew any legal right in themselves to bring the present action; and considering that, by law, the bed and beaches of navigable rivers are vested in the crown, as proprietors for the benefit of the public; and, further, considering that Plaintiffs have not established any right in law to be considered as proprietors of or being in any way vested with any property in the bed or beach of the river St. Lawrence, as contended for by their action; and, further, considering that the powers given by statute 16 Vict., to Plaintiffs, for the care and management of the harbour of Montreal, do not import in any way a conveyance or title, by reason of which Plaintiffs can be entitled to bring the present action; and, further, considering that the powers given to Plaintiffs, under and by virtue of the 16 Vict., even if their powers operated as an absolute conveyance to Plaintiffs of the property in the bed and beach of the river which they do not, would constitute Plaintiffs and Defendants *propriétaires limitrophes*,

and that, as such, the only action which would have accrued to Plaintiffs, under the circumstances, would have been an action *en bornage*, the court doth dismiss the action of Plaintiffs." (5 *J.*, p. 155.)

A et W. ROBERTSON, for Plaintiffs.

CROSS et BANCROFT, for Grant and Hall.

BETHUNE et DUNKIN, for B. Lyman *et al.*

H. STUART, Counsel.

CAPIAS.—DETERIORATIONS SUR IMMEUBLE HYPOTHEQUE.

COUR SUPÉRIEURE, Montreal, 13 et 21 mai 1861.

Coram MONK, J.

DOUTRE *vs.* MCGUINNIS.

Jugé : 1° Que, dans l'affidavit, pour *capias*, il n'est pas nécessaire d'alléguer spécifiquement que sans le bénéfice du *capias*, le Demandeur souffrira des dommages et perdra sa créance, et qu'il n'est pas nécessaire de requérir l'émanation du *capias*, le *fiat* étant suffisant pour cela.

2° Que, dans l'affidavit, il n'est pas nécessaire de dire que les détériorations ont été faites *de propos délibéré* (*wilfully*), s'il paraît que ce n'est pas par accident ou dans le cours régulier des choses.

3° Que l'affidavit, s'il contient les allégations voulues par la loi, fait preuve *prima facie*, et que le Demandeur n'est pas tenu de faire d'autre preuve de ces allégations, sur une dénégation générale contenue dans une demande de libération.

4° L'immeuble prétendu détérioré ayant été vendu judiciairement, postérieurement au *capias*, le Demandeur sur *capias* s'en étant rendu adjudicataire, pour une somme inférieure à son hypothèque, et l'ayant ensuite revendu pour une somme plus élevé que le montant de son hypothèque, le bénéfice qu'il a réalisé n'est pas un motif pour le Défendeur d'obtenir sa libération. (1)

Le Demandeur étant créancier hypothéquaire d'une somme de £400, à peu près, et le Défendeur étant débiteur pour partie de cette somme, et détenteur par indivis de l'immeuble hypothéqué, le Demandeur se prévalut des dispositions du ch. 47 des *Statuts consolidés du Bas-Canada*, pour arrêter les détériorations qu'il accusait le Défendeur de commettre sur son gage. Cette loi, passée en 1858, contient en substance les dispositions suivantes : (Sec. 2.) Si un débiteur personnel hypothécaire ou tiers détenteur en possession d'un immeuble hypothéqué, l'endommage ou détériore, par lui-même ou par autrui, de propos délibéré, et avec intention de frauder le créancier, ou en diminue la valeur, en détruisant, enlevant ou vendant aucune maison, dépendances ou bâtiment, ou tous bois ou clôtures, il pourra être poursuivi en dommages par le créancier, quand même la somme garantie par hypothèque ne

(1) V. art. 800 et 819 C. P. C.

serait pas alors exigible. Et le Demandeur pourra obtenir contrainte par corps, pour le recouvrement de dommages égaux à la diminution en valeur occasionnée par les faits du Défendeur, ou jusqu'au montant de sa réclamation, s'il est moindre que celui des détériorations. (Sec. 3.) Si le Demandeur déclare dans un affidavit qui sera fait en la manière prescrite pour les cas où l'on peut obtenir un bref de *capias ad respondendum*, que le montant garanti par son hypothèque excède $40, et que le Défendeur, dans l'intention de frauder le Demandeur, personnellement ou par l'entremise d'autres personnes, endommage, détériore ou diminue en valeur l'immeuble hypothéqué, etc., ou est sur le point de le faire, à un montant de plus de $40, en détruisant, enlevant ou vendant quelque maison, dépendances ou autre bâtiment dessus construits, ou de propos délibéré, les endommageant et détériorant ou en détruisant et enlevant tout bois ou pièce de charpente ou des clôtures ou aucune pièce enclavée dans toute maison ou bâtiment situé sur tel immeuble, un bref de *capias* pourra émaner, etc. Dans son affidavit, le Demandeur disait que le Défendeur était déterminé à détériorer l'immeuble hypothéqué de manière à priver le demandeur des moyens d'être payé de sa créance, que, dans l'intention de frauder le Demandeur, il avait, personnellement et par l'entremise d'autres personnes, endommagé, détérioré et diminué en valeur l'immeuble, à un montant de plus de $600, en détruisant, enlevant et vendant une maison ou bâtiment situé sur l'immeuble, les bois debout *(timber)*, la charpente des dépendances y érigées, les clôtures et autres pièces enlevées dans les dépendances, et que le Défendeur avait causé des dommages de $600 ; que le Demandeur était informé de ces faits par deux personnes (nommées) qui avaient donné leur déposition sous serment, et que, de plus, le Défendeur lui-même l'avait informé de ses intentions, en se moquant des avertissements qu'il lui avait donnés relativement aux conséquences auxquelles il s'exposait en agissant ainsi. Dans une première demande de libération, le Défendeur prétendit que le Demandeur devait requérir, dans son affidavit, l'émanation du *capias*, qu'il souffrait des dommages et perdrait sa créance ; et qu'il devait dire que les dommages et détériorations avaient été commises de *propos délibéré* (wilfully.) Dans une seconde demande de libération, le Défendeur énonça les fait suivants : que l'immeuble avait été vendu le 10 avril 1861, par le shérif et qu'il avait été adjugé au Demandeur pour £400 ; que, depuis cette vente, le Demandeur avait vendu le même immeuble pour £750, dont £250 comptant et le reste à termes, avec intérêt ; que ces £750 couvraient la créance du Demandeur et au-delà ; que, d'ailleurs, tous les allégués de l'affidavit

étaient faux. Le Demandeur, sans admettre la prétention légale du Défendeur, répondit à cette seconde demande en prouvant que les hypothèques antérieures à la sienne le laissaient créancier pour plus de £200, après la distribution des deniers.

MONK, J. : Quant au premier point, le Défendeur a confondu le *capias* avec la saisie-arrêt avant jugement. Il n'est pas nécessaire pour obtenir un *capias*, des mots sacramentels de la saisie-arrêt que le *Demandeur est exposé à perdre sa créance ou souffrira des dommages*. D'ailleurs, si la chose était nécessaire, elle est suffisamment alléguée dans l'affidavit qui dit que le Défendeur est déterminé à détériorer l'immeuble de manière à priver le Demandeur des moyens d'être payé de sa créance et que le Défendeur cause au Demandeur des dommages de $600. Le *fiat* joint à l'affidavit suffit pour justifier l'émanation du *capias*, la loi n'imposant pas au Demandeur la nécessité de requérir le bref sous serment. Le second point présentait la question la plus épineuse à décider. Etait-il essentiel de dire, dans l'affidavit, que le Défendeur avait commis les détériorations de *propos délibéré ?* Il est évident qu'avec les énoncés de l'affidavit, le Demandeur ne pouvait pas hésiter à accuser le Défendeur d'avoir commis ces détérioration avec préméditation et la cour ne voit dans l'omission de ces mots qu'une inadvertance. Mais quand même ce ne serait qu'une inadvertance ; si la cour était d'opinion que ces mots sont essentiels, elle partagerait suffisamment les idées du temps, en faveur de la liberté individuelle, pour se prononcer pour la libération. D'un autre côté, ces mots paraissent être, dans la loi, une inadvertance même ; car, sur trois cas à peu près identiques, où elle déclare que le *capias* pourra émaner, ces mots ne se trouvent que dans un cas. Les deux cas, où ils ne se trouvent pas, couvrant tous les points de faits de l'affidavit, la cour ne peut les considérer comme nécessaires, dans cette instance. Le troisième point met en question tous les énoncés de l'affidavit et dit qu'ils sont faux. Si le Défendeur offre de prouver la fausseté des allégués de l'affidavit, la cour fixera un jour pour cette preuve. En attendant, ces allégués doivent être pris pour vrais ; car la loi dit, (Statuts Consol. ch. 47, sec. 3) que *s'il est prouvé que les allégations de l'affidavit sont fausses*, le Défendeur sera mis en liberté. La preuve retombe donc sur le Défendeur. La quatrième question n'est pas du domaine des investigations de la cour. Que le Demandeur ait acheté la propriété à bas prix et l'ait revendue avec bénéfice, cela ne justifierait pas le Défendeur d'avoir commis les détériorations avant l'événement décisif de la vente judiciaire. Le Demandeur s'est rendu adjudicataire, comme toute autre personne eût pu le faire. Il

au pu faire une bonne ou une mauvaise spéculation, la cour n'a rien à y voir. Cette vente n'a pas réalisé suffisamment pour le payer ; il a le droit de rechercher si c'est le Défendeur qni a diminué la valeur de son gage. Requête rejetée. (5 *J.*, p. 158.)

CHARLES DAOUST, avocat du Demandeur.

B. DEVLIN, avocat du Défendeur.

CONTRAINTE PAR CORPS POUR DETERIORATIONS SUR UN IMMEUBLE SAISI.

COUR SUPÉRIEURE, Montréal, 31 mai 1861.

Coram BADGLEY, J.

VARIN *vs.* COOK et al., *et* MCGINNIS et al., Mis-en-cause.

Jugé : Que pour obtenir l'incarcération d'une personne, pour détérioration sur un immeuble saisi, en vertu du chap. 85, sect. 29 des Statuts Refondus du Bas-Canada, il ne suffit pas que la requête ou la motion faite pour obtenir une règle contienne tous les termes et expressions du Statut, mais qu'il faut que la règle elle-même les contienne. (1)

Le Demandeur ayant demandé l'incarcération de deux des Défendeurs qui détérioraient un immeuble saisi sur eux, en vertu du Statut suscité, il émana de la cour une règle, dans laquelle les greffiers avaient omis d'insérer certains mots qui se trouvaient dans la requête sur laquelle la règle avait été émanée. Les mots en italique, dans la phrase suivante avaient été omis dans la règle : " que les Mis-en-cause ont, tant personnellement que par l'entremise d'autres personnes, depuis la saisie de l'immeuble pris en exécution en cette cause, endommagé et détérioré le dit immeuble au montant de £150, en enlevant une maison, ou la détériorant *volontairement &c., de manière à exposer le Demandeur à être privé de ses justes droits.*"

BADGLEY, J.: Quand il s'agit de la liberté du sujet, la pratique est rigoureuse, et l'on ne peut s'enquérir si les termes de la loi peuvent se trouver, par implication, dans des termes prétendus équivalents. Dans cette instance, la requête sur laquelle la règle a été émanée contenait bien toutes les allégations essentielles ; mais cette requête est un procédé *exparte*, la règle seule étant signifiée à la partie accusée. La règle devait contenir elle-même toutes les exigences de la loi, puisqu'elle forme le principal corps de la procédure. Règle déchargée. (5 *J.*, p. 160).

M. LANCTOT, Avocat du Demandeur.

B. DEVLIN, Avocat des Mis-en-cause.

(1) V. art. 2054, 2055 et 2272 C. C. et 781 et 800 C. P. C.

APPEAL BOND.—LIABILITIES OF SURETIES.

SUPERIOR COURT, Montreal, 30th November, 1860.

Coram BADGLEY, J.

WHITNEY *vs.* BROOKS et al.

Held: That, were a judgment orders the issue of a writ of *contrainte* against a Defendant, and his imprisonment until he shall have paid the debt, interest, costs and subsequent costs in the cause by virtue of a previous judgment, and, on an appeal from the judgment ordering the *contrainte*, the sureties obligate themselves that (the Defendant) shall effectually prosecute the appeal of the judgment and pay such condemnation money, costs and damages as shall be adjudged, in case the judgment or sentence of the Superior Court be affirmed, the sureties, in the event of the confirmation of the judgment, are not immediately liable to Plaintiff for more than the costs of the appeal, and are not liable for the balance of the condemnation money against Defendant until Plaintiff has first enforced the order for *contrainte* against Defendant. (1)

That Plaintiff is liable for the costs of the contestation, although the Defendant pleaded the general issue.

This was an action on an Appeal Bond against the sureties. The judgment appealed from is reported in 8 *R. J. R. Q.*, p. 240, The terms of the bond were as follows: The Defendants " obligate themselves that said William Brooks shall effectually " prosecute the appeal of said jugement, and pay such condem- " nation money, costs and damages, as shall be adjudged, in " case said judgment or sentence of the Superior Court be " affirmed." The appeal was effectually prosecuted, and the judgment of the Superior Court affirmed. The Plaintiff then sued the sureties on the bond. They pleaded, after admitting their liability for the costs of the appeal, the amount of which they tendered to Plaintiff, that, by the judgment appealed from, a rule for *contrainte par corps* was made absolute, aud a writ for *contrainte par corps* ordered to issue to arrest the body of Wm. Brooks, and imprison him in the common Jail, for the District of St. Francis, until he should have paid the debt, interest, costs and subsequent costs, due under a certain judgment previously rendered in the cause, that, according to said judgment and by law, before attacking the sureties, Plaintiff was bound to sue out a writ of *contrainte par corps* against Brooks, and to enforce and execute the *contrainte* granted by the judgment against Brooks, which Plaintiff had not done or attempted to do, and that Defendants could only be made liable by law under said Bond, in case Brooks should not be forthcoming when such process of arrest did issue. Plaintiff replied that the judgment appealed from, and the judgment of the Queen's Bench, in effect condemned Brooks

(1) V. art. 1122, C. P. C.

to pay the debt, interest, costs, subsequent costs, &c., in virtue of a former judgment of the 30th December, 1858, and the costs of the appeal; that neither Defendant nor Brooks have paid or satisfied any part thereof, and persisted in the conclusions taken in their declaration.

"The court, considering that, by the order or judgment rendered by this court, on the 30th day of June, 1859, in favour of Plaintiff against William Brooks, the Defendant and *mis en cause*, the rule for *contrainte par corps* obtained by Plaintiff against Brooks, was declared to be absolute, and it was thereby ordered that a writ of *contrainte par corps* should issue, to take, and arrest, and to imprison the person of Brooks, until the payment of the several sums of money in said order or judgment mentioned, which said order or judgment was affirmed by judgment of the court of Queen's Bench, sitting in appeal, on the 31st May, 1860, considering that the security bond fyled by Plaintiff, and by him sued upon, and the suretyship in the bond contained, was by Defendants given and entered into upon the appeal entered by Brooks in the Court of Queen's Bench, against said order or judgment first above mentioned, for the *contrainte par corps* against Brooks, and upon which appeal said judgment of the 31st day of May, 1860, was rendered, and considering that it doth not appear, by the record, that Plaintiff hath enforced said order or judgment against the person of Brooks, or hath issued or caused to be issued said writ of *contrainte par corps* against him, and that Defendants, by said bond and by their suretyship, are not liable for the sums of money in this action demanded of them by Plaintiff, save and except for the sum of £31 16s. for costs taxed on the appeal, doth condemn Defendants to pay and satisfy to Plaintiff the sum of £31 16s. with interest from 20th July, 1860, date of the service of process in this cause, and costs of suit as of a judgment on confession, and considering that Plaintiff hath raised a contestation with Defendants upon their offer by them in their plea contained, of their consent to the entry of a judgment in his favour against them for said sum of £31 16s. and hath failed on said contestation. The court doth condemn Plaintiff in the costs of said contestation. (5 *J.*, p. 161.)

TORRANCE and MORRIS, for Plaintiff.

ABBOTT and DORMAN, for Defendants.

ENQUETE.—TEMOINS.—PREUVE.

COUR SUPÉRIEURE, Montreal, 28th February, 1861.

Coram BERTHELOT, J.

DAVID *vs.* MCDONALD *et al.*

Held: That one of two sets of Defendants who are sued as jointly and severally liable to Plaintiff, can examine each other as witnesses, in support of the separate issues raised by them. (1)

This was a hearing on an objection taken at *enquête*, and reserved for hearing *in banco*, to the examination by one set of Defendants of their co-Defendants, on the ground that being jointly and severally liable, they had a pecuniary interest in the event of the suit, as respected each issue therein, whether raised separately or otherwise, and that the fact of the parties having pleaded separately did not affect the legal disability invoked.

PER CURIAM: This being the first case of the kind since the passing of the recent statute, I have consulted all the other judges of the court, and we are unanimously of opinion that mere interest is no longer a bar to the examination of a witness, and that it can be merely appealed to as affecting his credibility. Objection over-ruled. (5 *J.*, p. 164.)

BETHUNE and DUNKIN for Plaintiff.

A. and W. ROBERTSON, and MACKAY, and AUSTIN for Defendants.

INTERRUPTION OF PRESCRIPTION.

CIRCUIT COURT, Montreal, 31 December, 1860.

Coram MONK, J.

BENJAMIN et al. *vs.* DUCHESNAY et vir.

Held: That partial payments on an open account interrupts the prescription under the Statute of Limitations. (2)

This was an action for goods sold and delivered brought against a married woman separated as to property from her husband. The Defendant pleaded the Statute of Limitations. The Plaintiff answered that payments had been made within six years on the account, and that thereby the case was taken out of the Statute. The question was whether payments made generally on an open account took the case out of the Sta-

(1) V. art. 251 C. P. C.

(2) V. art. 1235 et 2227 C. C.

tute. On the facts proved, the Court being of opinion that the prescription had been interrupted, rendered judgment in favor of Plaintiff. (5 *J.*, p. 168.)

B. DEVLIN for Plaintiffs.

ABBOTT and DORMAN for Defendants.

RESCISION POUR CAUSE DE MINORITE ET LESION.

SUPERIOR COURT, Montreal, 30th April, 1861.

Coram MONK, J.

LARIVIÈRE *vs.* ARSENAULT et LARIVIÈRE.

Jugé: 1° Que l'indemnité due au mineur, pour lésion, ne souffre pas réduction du montant qu'il a reçu, et qu'il n'est pas obligé de rembourser ce qu'il a reçu, à moins qu'il ne soit plaidé et prouvé que ce qu'il a reçu lui a profité. (1)

2° Que la preuve de la lésion, pour le mineur, peut être déduite, sans être positivement prouvée.

3° Que le fait que le mineur aurait géré une partie considérable de ses affaires, pendant sa minorité, n'est pas une excuse pour repousser la rescision.

4° Les fruits et revenus sont dus au mineur depuis la date de la transaction attaquée, par voie de rescision, si le Défendeur ne prouve pas autrement sa bonne foi que par le fait que ce mineur avait fait des affaires durant sa minorité.

5° Le mineur obtenant rescision, n'est tenu de rembourser que les impenses *nécessaires.*

Le 26 Février, 1853, le Demandeur, étant encore mineur, avait été induit, par la tentation d'une légère somme d'argent, qui ne pouvait et n'a pas tourné à son profit, et à lui offerte par son frère, Jean Baptiste Larivière, l'un des Défendeurs, à vendre à ce dernier la part qu'il avait dans une terre dont la moitié était échue par succession, à lui et à ses frères et sœurs. Cette vente lui faisait éprouver une lésion considérable, et il en demandait la rescision, avec fruits et revenus, depuis la vente qu'il en avait faite. Paul Arsenault, l'un des Défendeurs, étant en possession de la totalité de la terre, l'action était dirigée contre lui et contre l'acquéreur; et les conclusions de la déclaration demandaient que le jugement fût déclaré commun aux deux Défendeurs, qu'Arsenault fût condamné à délaisser et à payer les fruits et revenus depuis la vente du 26 février 1853, si mieux n'aimaient les Défendeurs payer en argent la valeur de la propriété et les fruits et revenus. ARSENAULT plaida que le Demandeur ne pouvait obtenir les conclusions de sa déclaration, sans offrir de remettre ce qu'il avait reçu par l'acte du 26 février 1853, qu'ayant acquis et possédé de

(1) V. art. 987 et 1011 C. C.

bonne foi, il ne pouvait être contraint à payer de fruits et revenus; que, d'ailleurs, il avait fait des impenses et améliorations, en clôtures, fossés, etc., qui compensaient toute somme qui pourrait être accordée au Demandeur pour fruits et revenus.

LARIVIÈRE, outre les moyens de défense opposés par Arsenault, plaida que le Demandeur avait vendu sa part de terre quelques mois seulement avant sa majorité; qu'avant cette vente, le Demandeur transigeait lui-même ses affaires ; qu'avant cette vente, les frères et sœurs du Demandeur avaient vendu au Défendeur (Larivière) leurs parts de terre, pour un prix plus modique que celui qui avait été payé au Demandeur; qu'au lieu d'avoir recherché cette acquisition, elle lui avait été offerte par le Défendeur ; qu'au reste le prix payé au Demandeur était le juste prix de la dite part de terre. Le Demandeur répondit *en droit*, à chacune de ces défenses, qu'il n'était pas tenu d'offrir ce qu'il avait reçu, pour maintenir son action, et que les Défendeurs n'en pouvaient obtenir la remise, qu'en alléguant que ce que le Demandeur avait reçu avait tourné à son profit. *En preuve*, le Demandeur établit, en produisant l'acte d'acquisition d'Arsenault, que ce dernier avait payé, en 1855, pour chaque part de la même terre, six fois plus que le Demandeur n'avait reçu, et, par deux témoins, il prouva que la terre en question ne valait pas plus en 1855, qu'en 1853.

DOUTRE, J., pour Demandeur, cita sur la première question du texte: TOULLIER, T. 7, No. 580; DURANTON, T. 12, No. 562. Sur la seconde question: TOULLIER, T. 7, No. 577. Sur la troisième et quatrième question: TOULLIER, T. 10, Nos. 45, 46; POTHIER, *Vente*, Nos. 357, 370. Sur la cinquième question: POTHIER, *Vente*, Nos. 362, 363, 364, 369, 370.

" La Cour, maintient la réponse en Droit du Demandeur aux moyens de défense contenus dans le premier alinéa de la Défense plaidée par Arsenault, et déboute le premier alinéa de la dite Défense, et maintient la Réponse en droit du Demandeur à l'exception péremptoire en premier lieu plaidée par Larivière, l'un des Défendeurs, et déboute la dite Exception. Et, adjugeant au mérite, la cour considérant que, lors de l'acte de vente du 26 février 1853, passé devant David et son confrère notaires, par le Demandeur au Défendeur Larivière, le Demandeur était mineur, et que le Demandeur a souffert *lésion* de tel acte, rescinde et annulle la vente de la part indivise du Demandeur, savoir, un neuvième indivis dans la moitié de la terre mentionnée dans la déclaration, déclare le Demandeur propriétaire de la dite part indivise, et, en conséquence, le réintègre dans la possession d'icelle, de même que si la dite vente n'eût jamais eu lieu. Et déclare le présent juge-

ment commun aux Défendeurs. Et condamne le dit Arsenault, comme détenteur actuel de la dite terre et part de terre, à délaisser et abandonner au Demandeur, sous 15 jours de la signification du présent jugement, le neuvième indivis dans la moitié de la terre, et à payer au Demandeur les fruits et revenus accrus sur le neuvième indivis dans la moitié de la terre, lesquels fruits et revenus sont de $23.33 pour le passé, si mieux n'aiment les Défendeurs, sous le dit délai de 15 jours, payer au Demandeur, chacun pour le tout, et sans division ou discussion préalable, la somme de $143.33, pour tenir lieu tant de la part de terre que des fruits et revenus, avec intérêt sur la dite somme à compter de ce jour jusqu'à l'actuel paiement. (5 *J.*, p. 222.)

DOUTRE et DAOUST, avocats du Demandeur.

MOREAU, OUIMET et MORIN, avocats des Défendeurs.

TRIAL BY JURY.

SUPERIOR COURT, Montreal, 30th June, 1860.

Coram BERTHELOT, A. J.

FOGARTY *vs.* MORROW *et al.*

Held : That an action of damages for malicious prosecution, arising out of mercantile transactions between merchants, is not a "civil suit of a mercantile nature," within the meaning of the 39th section of chapter 84 of the Consolidated Statutes of Lower Canada, entitling the parties to a trial by a Jury composed exclusively of merchants and traders. (1)

This was a motion by Defendant, demanding that the Jurors should be selected from the special list of merchants and traders, as provided by the 39th Section of Chapter 84 of the Consolidated Statutes for Lower Canada.

PER CURIAM : I am clearly of opinion that, although the prosecution complained of in the present action had its origin in certain mercantile transactions between merchants, the action of damages consequent thereto is not a "civil suit of a mercantile nature," and I, therefore, reject the motion. (5 *J.*, p. 222.)

B. DEVLIN, for Plaintiffs.

LOUIS RICARD, for Defendants.

(1) V. art. 348 et 363 C. P. C.

EXPERTISE.

SUPERIOR COURT, Montreal, 24 Juin, 1861.

Coram BERTHELOT, J.

AUCLAIRE *vs.* LOW.

Jugé : Qu'une personne qui a déjà agi comme expert dans une cause ne peut agir dans une seconde expertise, si la première est rejetée, et s'il est fait objection à la nomination de cette personne, lorsqu'il s'agit de nommer de nouveaux experts. (1)

Des experts avaient été nommés en cette cause, et leur rapport avait été rejeté pour informalités dans leur procédure. Il s'agissait de nommer de nouveaux experts, pour déterminer les mêmes faits que ceux qui avaient été référés à la première expertise. Le Défendeur proposa, comme son expert, la même personne qui avait agi pour lui en premier lieu. Objection étant faite à la nomination de cette personne, sur le motif qu'elle avait une opinion toute faite sur les faits qui étaient référés à son examen, et qu'il était impossible d'en attendre de l'impartialité. La cour maintient l'objection et contraint le Défendeur à nommer une autre personne. (5 *J.*, p. 223.)

DOUTRE et DAOUST, Avocats du Demandeur.

CROSS and BANCROFT, Avocats du Défendeur.

ENQUETE.—TEMOIN.—PARTIE EN CAUSE.

SUPERIOR COURT, Montreal, 31st December, 1860.

Coram MONK, J.

BAILEY *vs.* MCKENZIE et al.

Held : That a party may be examined by his adversary as an ordinary witness, in addition to being examined on Interrogatories *sur faits et articles, vivâ voce*, in open Court. (2)

This was a hearing on an objection taken at *enquête*, and reserved for hearing *in banco*, to the examination of one of Defendants who had been summoned by Plaintiff, under an ordinary *subpœna*, to give evidence in the ordinary form as a witness. The objection was based on the fact that Defendant had already been examined by Plaintiff by means of Interrogatories *sur faits et articles* which had been administered and answered *vivâ voce* in open Court.

PER CURIAM : However anomalous the proceeding may ap-

(1) V. art. 327 C. P. C.

(2) V. art. 221 et 251 C. P. C.

pear, the statute has no doubt so ordained, and, as I find a judgment has been rendered by another judge sanctioning this course of practice, I feel that I must overrule the objection. Objection overruled. (5 *J.*, p. 223.)

A. and W. ROBERTSON, for Plaintiff.

BETHUNE and DUNKIN, for Defendants.

CORPORATION TAXES.—LEASE.

CIRCUIT COURT, Montreal, 31st May, 1861.

Coram MONK, A. J.

PINSONNEAULT *vs.* RAMSAY.

Held : That the rate levied upon all the assessable property, in Montreal, under the provisions of the 3rd section of the Statute 22nd Vic., ch. 15, is recoverable by landlords from such of their tenants as by their leases have agreed to pay the yearly assessments on the property leased.

This was an action by a landlord, to recover from his tenant the rate imposed by the Statute of 1859, and vulgarly denominated "The Special Tax"; the tenant having bound himself, by his lease, to pay the yearly assessments on the property leased.

PER CURIAM : The action here was for the recovery of assessments, under the terms of a lease from the Plaintiff to the Defendant, dated subsequently to the Act imposing the special tax in question in this cause. The terms of the lease were, that the lessee should pay the "Assessments," "City Taxes." "Municipal taxes," and "Assessments" must be considered as equivalent in their signification ; the same in meaning. The words "the Assessments" must also signify and be taken to mean all the "Assessments," all the City and Municipal taxes"; if they mean anything, this is their plain, their obvious signification. The court cannot hold that they mean the half, the one-third, or the one-fourth of the "City taxes," "Assessments"; nor can it make them apply to a particular tax, as distinguished from any other. If these terms "the Assessments" do not include the whole city taxes, which, or what portion do they comprehend ? It has been contended that this tax having been imposed by Legislative enactment and not by a by-law, it is not, therefore a municipal tax, it is not an "Assessment." The court is clearly of opinion that this distinction is unfounded. It is ingenious enough, but not sound. Whence is this tax derived ? on what is it imposed ? the assessable property of the city. To what is it destined ? to and for what purpose is it to be applied ? municipal objects,

the liquidation of debt contracted for municipal purposes, and these alone. It is, therefore, plain that this tax is municipal in its character and purposes : it is a city tax, an assessment. The parties to this deed have agreed that the lessee, the present Defendant should pay the assessments, all the assessments. They did not think proper to distinguish what assessments he should pay, if not bound to pay the whole, and the court cannot make a distinction ; where the law or the agreement has made no restriction, the court will not. The intention of the parties must be inferred from the language of the agreement, and, in this case, there is no doubt that the judgment must go for Plaintiff. Judgment for Plaintiff. (5 *J.*, p. 227 et 12 *D. T. B. C.*, p. 82.)

A. H. LUNN, for Plaintiff.

S. BETHUNE, Counsel.

R. MACDONNELL, for Defendant.

CORPORATION TAXES.—LEASE.

SUPERIOR COURT, Montreal, 31st May, 1861.

Coram BADGLEY, J.

COURCELLES dit CHEVALIER *vs.* LONGPRÉ.

Held : That the rate levied upon all the assessable property in Montreal under the provisions of the 3rd section of the Statute, 22 Vic., ch. 15, is *not* recoverable by landlords from such of their tenants as by their leases have agreed to pay the yearly assessments on the property leased.

This was an action similar in character to the case of *Pinsonneault* vs. *Ramsay* reported above.

PER CURIAM : The contract in this case must be interpreted in the same way as any other contract. Here, the stipulation is to pay the taxes and assessments, and we have only, therefore, to enquire what did the contracting parties mean by these words. We all know that by the old Road Act, the the magistrates were ordered to levy an assessment for the proper maintenance of the city roads. Now, that authority has been extended to the City Corporation, with power to increase the rate merely. For 50 years the word "Assessment" has been known to mean the city taxes, properly so called, that is the assessment on the rent of the property. Now, in 1860, a tax was levied by Government to pay a debt of the City. It was however not to go into the general funds of the city but to be applied specially. Now, what are the terms of the lease here (made in January, 1858) "de payer toutes les taxes ou cotisations à être imposées, &c." Now this must

surely be held to mean to be imposed by the city. What is more in this case, the lease was made two years before the tax was imposed. How could the parties be said to have contemplated this particular tax ? I think not. It is useless, however, to say more about the matter, and I therefore dismiss the Plaintiff's action. (1) (5 *J.*, p. 228.)

ROUER ROY, for Plaintiff.

M. CHARPENTIER, for Defendant.

CAPIAS.

SUPERIOR COURT, Montreal, 30th December, 1861.

Coram BADGLEY, J.

HOGAN *vs.* HOSKINS.

Jugé: Qu'un affidavit pour *capias* commençant comme suit : "T. S., de la cité de Montréal, teneur de livres de H. H., le Demandeur, étant dûment assermenté, dépose dit," est suffisant, sans une allégation dans le corps de l'affidavit qu'il est tel teneur de livres.

BADGLEY, Justice: This is a motion to quash a *capias*, and the ground mainly relied on is that there is no oath to the fact that the party making the affidavit is Plaintiff's book-keeper. The affidavit commences as follows : " Thomas Jubb, " of the city and district of Montreal, the book-keeper of " Henry Hogan, of the same place, hotel-keeper, being duly " sworn doth depose and say that &c." I hold this to be sufficient, (see 2 *R. J. R. Q.*, p. 246.) Motion rejected. (12 *D. T. B. C.*, p. 84.)

DEVLIN, for Plaintiff.

MURRAY, for Defendant.

(1) By the act 16 Vic., cap. 22, establishing a consolidated municipal loan fund for Upper Canada (extended to Lower Canada by the 18 Vict., ch. 13) it was in effect enacted that the corporation of any county, city, incorporated town, township or village, might by by-law, authorize a sum of money to be raised on the credit of the consolidated municipal loan fund, to assist in making or completing any railroad, canal or harbour, or for the improvement of any navigable river, when such by-law was passed, as provided by the act, and approved of by the Governor in Council. It was by sect. 6, made the duty of every treasurer of a municipality, *ipso facto*, and without requiring other authority or direction, to certify to the clerk of the municipality, the amount required to meet the interest or principal falling due on the debentures, and it was made the duty of the clerk " to assess the amount so certi- " fied yearly, upon all the taxable property in his municipality."

By the 22 Vict. cap. 15, sec. 3, the 6th section of the previous act was amended, and it was enacted that " there shall, in the present year 1859, be " levied upon all the assessable property in every municipality which has " raised money by Debentures issued under the Acts aforesaid, a rate of five " cents in the dollar, upon the assessed yearly value, and a like per centage " on the interest at the rate of 6 per cent per annum of the assessed value of

MUNICIPAL CORPORATION.—ROAD-WORK.—SALE OF LANDS.—ACTION NEGATOIRE.

QUEEN'S BENCH, IN APPEAL, Montreal, 7 June, 1861.

Coram Sir L. H. LAFONTAINE, Bart., C.-J., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

SIR DUNCAN MCDOUGALL, (Plaintiff in the Court below.) Appellant, and THE CORPORATION OF THE PARISH OF ST-EPHREM D'UPTON, (Defendants in the Court below) Respondents.

Held: That Local Councils cannot cause the lands of absentee proprietors situated within their jurisdiction to be sold for the non-performance of road-work required by procès-verbal, where such work had been let out by such councils to the lowest bidder, until after judgment has been obtained against such proprietors for the work done by road officers, as permitted by the municipal act.

That the letting out of road-work to which any lands are liable, under procès-verbal, by contract to the lowest bidder, where the work was to be done by private individuals, is a mode not sanctioned by law and wholly illegal.

That an action in the nature of an action *négatoire* to have lands declared free from municipal rates illegally imposed and to have councils desist from sale of such lands for such illegal rates is the proper remedy.

This was an appeal from a judgment of the Superior Court, at St. Hyacinthe, and the case is presented by the parties in their factums as follows:

Appellants: The appellant was proprietor of lots 58, 59, and 60, in the 20th range of the township of Upton, district of St. Hyacinthe, also 61, 62, 63, 64 and N. E. half 65, in 20th range of same township, and all situated in the municipality of St. Ephrem d'Upton. Respondents caused these seven and a half lots of land to be advertised for sale for municipal rates, on the 7th February, 1859, for the sum of $1609,64. This very large expense was said to have been incurred in constructing a road from the North side of the line of the Grand Trunk

"such property, and a like rate in each year thereafter until the total sums "payable as principal or interest to the Receiver General by reason of such "Debentures, shall be paid off, or until a reduced rate shall be substituted by "Order in Council as hereinafter mentioned: such rate shall be levied by "virtue of this Act, but shall be entered on the Collector's Rolls, and "collected and paid to the Treasurer of the Municipality in the same manner "as ordinary rates imposed by municipal By-laws, and whether any other "rate is or is not imposed in the municipality in the same year.

Sub. sect. 3. provides that the proceeds of such rate "shall be applied by "the Treasurer exclusively towards the payment of the sum payable by the "Municipality to the Receiver General in each year. &c."

Sub. sect. 4. Treasurer or collector, &c, "neglecting or refusing to "perform or concur in performing any official act requisite for the collection "of the rate, &," to be guilty of a misdemeanor.

Railway, to the line of the township of Milton, and between the 19th and 20th Ranges of Upton, and terminating in the wilderness, and connecting with no communication whatever, at the terminus, at the line of Milton, and while the road was made contiguous to the range line, dividing the 19th and 20th Ranges of Upton, the whole burden of making the road from the line, between 60 and 61, to the line between 64 and 65, is put upon the lots 61, 62, 63, and 64, belonging to appellant, in the 20th Range. The respondents based their pretension of right to sell these lands upon the report of Joseph Duhamel, appointed by them to examine and lay out this road, made to the Municipal Council of the Parish of St. Ephrem d'Upton on 1st August, 1857, and which was considered by said Council on 7th. December, 1857, and homologated with this proviso, *that the said road should not be opened till applied for by the parties interested.* On the 3d May, 1858, this proviso was repealed by said Council. The defendants then caused the making of said road to be given out by contract, and, for the contract price, caused the appellant's lands to be advertised for sale, as aforesaid. Appellant, prior to this action being instituted, caused a protest to be served upon défendants, setting forth the grounds of his objections to said tax, and offered to plead to an action brought in any court of competent jurisdiction, and to give security to answer the condemnation if the assesments were held legal. Respondents persisted in the sale of said lands, and appellant instituted the action now in appeal, in the Superior Court, in the District of St. Hyacinthe, alleging a *trouble de droit* in the possession of his lands, by reason of the acts of respondents, setting forth that the proceedings of respondents were illegal, and oppressive, and concluding that respondents be condemned to desist from troubling appellant in the peaceable possession and enjoyment of his lands, that said lands be declared free from all municipal assessments and burdens, dues and penalties; that respondents be condemned to desist from the sale of said lands, and pay appellant damages in $2000. This action was met by respondents by plea in law and fact, in substance pretending that respondents' proceedings were legal and regular, and even if they were not, they were supreme, and there was no appeal from their acts, except to the County Council, and, if they had not legally verbalized the road in question, they had general power to levy any sums of money, required for road purposes, and the road in question was a front road and could be built without proces verbal. The merits of these pretensions will be better appreciated, by examination of the particular allegations of appellant, as based upon the provisions of the municipal acts, and the proof of record. Appellant

submits that respondents, having predicated all their proceedings upon the report or proces verbal of Joseph Duhamel, have defined their position, and must acquiesce in the consequences of it. They cannot after their acts are brought in question, and found illegal, fall back upon other powers claimed to be vested in them, which they have not seen fit to exercise as a justification for their acts. As to the pretension that the powers of our Municipal Corporations are supreme over matters confided to their jurisdiction, this is only true so far as relates to the exercise of discretion within the limits of the law. When they do what the municipal acts do not confer upon them power to do, or do what is within their jurisdiction to do in any other manner than the law prescribes it is to be done, it is void, and the remedy for an excess of power, is not an appeal to another municipal body, possessing no power to remedy legal defects, but a resort to a court of law, which is invested with power to declare all proceedings, whether of individuals or corporations, illegal and void, which have not the warrant of law to sustain them. One thing is perfectly apparent, that appellant has suffered a gross injustice, by the acts of respondents. His lands are in a wild state, and they are taxed in one year, at the rate of about one dollar per acre, which is about half the average price of wild lands in Lower Canada. This tax is for a road not required for the local wants, and producing no benefit to the lands of any consequence, inasmuch as it communicates with no road, but stops in the forest, a mile from any road. While some of the lots of land on the 19th range, are owned by parties desiring this road, and the road is sought between the two ranges, the lots on the 19th range are taxed nothing, and the whole burden is put upon appellant's land on the 20th range. It is difficult toaccount for the proceedings of Respondents respecting Appellant's lands upon any other supposition than that the operation was regarded as a profitable speculation, a means of causing a considerable sum of money to be expended in the municipality without any very serious scruples, as to the means used to obtain it. The questions that arise are; 1° Is there any legally homologated procès verbal of the road in question? 2° If there is, is that procès verbal made according to the requirements of the municipal acts, so as to be binding upon the parties affected by it? 3° Have the parties bound to make the road by said procès verbal, been required to do it, and, upon their failure to comply with the requirements of the procès verbal, has the road been made by road officers, and the costs of making, with 20 per cent added as a penalty, been collected of the defaulters according to law? 4° If any, or all these questions must be answered in the negative, is there any

remedy for the wrong, and was Appellant's a proper remedy? In answering the first question, Appellant submits that it is not shown that the notices required by law were given to the parties interested, when the officer would visit and lay out the road, nor that the council caused proper notice to be given of the time when the report would be homologated, (18 Vic. c. 100, s. 8) (18 Vic. c. 100, s. 47, par 2.) (18 Vic. c. 100, s. 49, par 2). (1) The pretended homologation of the report of Joseph Duhamel, on the 7th December, 1857, with the proviso that the road should not be opened till the parties interested required it, and the repeal of said proviso, on 3rd May, 1858, without notice, and without the request of the parties interested, was irregular, illegal, and unjust, and cannot be held to be a compliance in good faith with the 18 Vic. c. 100, s. 49, par. 2, which says that "every council, before proceeding to any such examination shall cause public notice to be given through their Secretary-Treasurer, to the inhabitants of the municipality or municipalities, interested in the work to which such *procès verbal* relates, of the day, hour and place at which the council will proceed to the examination or revision of such *procès-verbal*." Appellant was the party mainly interested in the matter of said road, he did not request it opened, and he was not made aware, nor was his agent made aware it was intended to open it, but the device appears to have been resorted to, in order to deprive him of notice, instead of giving him notice of the final homologation of the procès-verbal. The act being violated, both in form and in spirit, Appellant submits that there is no valid *procès-verbal* of the road. The second question is answered with still less difficulty. The pretended procès-verbal is defective in almost all the requisites of *procès-verbaux*, vide 18 Vic. c. 100, s. 47, par. 5, 6 and 7. (2) The position of the road is not so defined as to render it possible for road officers to act upon it with any certainty. It was to be made "near" the line between 19 and 20 R. How near? Within one or twenty rods? It is not stated what part is to be contributed in money, and what in work or materials, when or to whom the money or materials be paid or delivered, or under the superintendence of what officers it was to be done. It evidently contravenes the intention of the last mentioned 6th paragraph, in putting the whole burden of a front road between the ranges, altogether for a large portion of the distance entirely on the contiguous lots on the one 20th range. It contains a provision impossible of execution, viz, that a certain bridge should be made by the proprietors of certain lots, *if the Grand Trunk Railway*

(1) V. art. 796 et 806, C. M.

(2) V. art. 799, C. M.

Company could not be compelled to build it; thus rendering it incumbent upon the proprietors to determine the legal responsibilities of the Railway Company, before they could ascertain their own. The road is a front road, and is required to be made only 26 feet wide, while 18 Vic. c. 100, s. 41, requires every front road to be 36 feet wide. (1) It requires the road to be made before the 1st July, 1858, and the council only order it opened 3rd May, 1858 and if proper notices were given to the proprietors, they would only have about one month to build the road, and bridges, and determine the legal liabilities of said Railway Company. A procès-verbal, to be legal, must be sufficiently definite, and explicite to be susceptible of being carried out; must be according to the requirements of law, and must contain no directions impossible of execution. This is wanting in all these particulars. With reference to the third interrogatory, Vide 18 Vic. c. 100, s. 60, par. 1, 2 and 3. The course is here clearly pointed out which it is necessary to adopt. The council have done nothing of the kind. The notices, if given, were a snare, for there was not time for the proprietors to do the work required in the procès-verbal. The work was not done by road officers at all, but by contractors and speculators. The letting out of the making of the road by contract was a proceeding entirely unwarranted by law, and what the Council had no more power to do, than any other corporation or individual. (2) Lastly, is there any remedy? and is Appellant's action a proper remedy? By 12 Vic. c. 38, s. 7, " All courts, except the Queen's Bench, magistrates and all other persons *and bodies politic and corporate within Lower Canada,* shall be subject to the superintending and reforming power, order and control of the Superior Court." This power was exercised by the Superior Court in setting aside the by-laws of the municipality of Two Mountains, (3) and Shefford (4), on the petition of the Attorney General, under 12 Vic. c. 41, s. 8, as having exercised franchises and privileges not conferred on them by law. In these cases, the municipalities had passed by-laws for obtaining Municipal Loan Fund Debentures, without providing in such by-laws, for assessments to pay interest and sinking fund, according to law. The principle recognized was that the manner in which municipal corporations exercise their legislative powers, may be so far reviewed by the Superior Court, as to determine whether they have proceeded within the powers given them. This may be done

(1) V. art. 768 C. M.

(2) V. art. 779 C. M.

(3) 4 *R. J. R. Q.*, p. 318.

(4) 4 *R. J. R. Q.*, p. 338.

as well incidentally, as under the prerogative writs act. There is no power for an individual to use the remedy, provided by that act, as applied in the cases referred to, as a matter of right. It is only when the Attorney-General may give power, to use his official name as prosecutor. This the Attorney General has refused to do, in case where it was sought by the British American Land Company, respecting sale of their lands in Wickham. In such case, unless the individual has of his own right, power to appeal to the Superior Court, when his rights are infringed upon, by a corporation, the reforming and revising power of that Court is of no avail to him. The acts of Respondents, if legal, would have the effect of a forced alienation of Appellant's lands. It surely could never have been intended to plaec municipal councils in a position to exercise legislative, judicial and executive powers with an absolute despotism, which cannot be questioned by legal tribunals. In an ordinary action, between the Corporation of the City of Montreal, a by-law of the City Council was declared null as an excess of power. It is pretended that an appeal to the County Council being open to Appellant, (1) he should have resorted to this appeal, not having done so, he has lost his remedy. This has been before answered that the object of that appeal was only a review of the discretionary power exercised by the local Council. It could not make that legal which was, *ab initio*, in violation of law. But Appellant was deprived of this remedy, because notice was not given of the intention of the Conncil to act upon this procès verbal or report. The judgment in the Court below, by implication, admits the acts of Respondents to be illegal; but implies that no power exists in the Superior Court, to set them aside, except in the exercise of its revisory power under the prerogative writs act. If it were necessary to interpret 12 Vic. c. 38, section 7, as having exclusive reference to the remedies provided by 12 Vic. c. 41, which Appellant does not admit, there is an obvious distinction to be made between the direct exercise of a reforming power over the proceedings of municipal corporations, and the right of determining the extent of their powers, when brought in question incidentally, to enable the courts to adjudicate upon the rights of individuals, brought in conflict with those of corporations. The latter is a species of juridiction, that is possessed by every court. The land of a proprietor has been entered upon, and a quantity of trees felled and removed, fences taken down, and the land levelled, and ditched all against his will. He institutes an action against the parties who have done it. It is pleaded that a road has been ordered

(1) V. art. 926. C. M.

to be opened there by a local council having jurisdiction. It is proved that such local council had ordered such road to be opened, but had not complied with a single formality required by law, preliminary to the opening of a road. This would not be a defence to the alleged trespass. The Court would enquire whether the formalities of the law had been complied with, and if found not to have been observed, Plaintiff would succeed. For the purposes of that action, the proceedings of such council are set aside, but the decision proceeds no farther. There might be cases where the proceedings of the council, were regular and valid, but suits where they are invoked, fail for want of proof of the facts. In such cases, the proceedings of such council are not invalidated, except for the purposes of the particular action, where they were brought in question. If it were possible to determine the legality of the acts of a council, by certiorari or other privileged process, under the prerogative writs act, the decision would be final, as to the validity of their acts. If Appellant has no remedy, by this action, there is none open to him, *of right*, under the prerogative writs act. The proceedings which he complains of, are not the exercise of judicial powers, and cannot be reached by certiorari. For the same reason, a petition in the nature of a writ of prohibition, could not be granted, and the remedy sought is altogether inconsistent, with that of a mandamus. There is but one means of rendering the provisions of 12 Vic. c. 41, available to him, and that is where a local council has "exercised franchises" not conferred upon it by law, and this remedy can only be exercised by, or in the name of the Attorney-General, who may refuse to act for the protection of private rights. The legislation of our municipal corporation may be likened to the legislation in the United States, which is restricted by the constitution. Their powers are restricted to the limits of the acts creating them. Martin, Justice, in Mayor et al. *vs.* Morgan, condensed, Rep. La. Vol. 4, p. 131, remarks, "This court, and every court in this State, not only possesses the right, but is in duty bound, to declare void every act of the legislature, which is contrary to the constitution. The due exercise of this power, is of the utmost importance to the people, and if it did not exist, their rights would be shadows, their laws delusions, and their liberty a dream." There might be instances when our courts would be compelled to declare acts of the Provincial Parliament void, and that too from failure of formalities required. If a tax were imposed by Parliament upon the people, not first recommended by the Crown, it would be a violation of the Union Act, and would be null. This would not be remedied by the prerogative writs act. For the Superior Court, to revise, reform or annul acts of Parlia-

ment, would be a strange circumstance. Nevertheless, if the law were brought in question, in any particular suit, it would be declared void. It is a singular pretension to be urged, that local councils have greater immunities than the Parliament from which they derive their existence and privileges. It is remarked, in Angel and Ames on corporation: "The by-laws of a corporation must not be inconsistent with its charter; for this instrument creates it an artificial being, imparts to it its power, designates its object, *and usually prescribes its mode of operation*. It is in short, the fundamental law of the corporation; and in its terms and spirit, as a constitution to the petty legislature of the body, acting by, and under it. Hence, all by-laws in contravention of it are void." In the case of Boulanget *vs.* the city of Montreal, (1) the majority of this court held that, even the discretionary power exercised by a municipal council, as to amount allowed an officer named by them, could be revised by the court, in an ordinary action, and this too, when the act under which the council acted, gave power to the council to fix the amount of compensation in such cases. This is proceeding farther than in this case is asked. Appellant here does not claim a right in the Superior Court, or this Court, to revise or reverse, the decision of the Council of the parish of St. Ephrem d'Upton, acting in deliberation, and within the limits of their powers. It asserts that said council pretends to have a hypothecary claim upon Appellant's land, which it is seeking to enforce, and that no such claim exists. That the necessary proceedings have not been taken to create such a claim. Hence the issue here. Can this Court refuse to decide this issue? Suppose, instead of Appellant being Plaintiff, Respondents had sued Appellant for these pretended arrears of taxes; would it only have been necessary for them to have come into court, and said," We have arrears of rates upon your seven and a half lots of land in Upton, of $1509,64, pay us?" It surely would have been necessary for them to show that such rates had been *legally* laid. This is the issue here. Have they been *legally* laid? If not, then Appellant has a right to have his lands discharged from this incumbrance. In the case of *Beaudry* vs. *the City of Montreal*, (2) the majority of this court held that the proceedings of the justices of the peace and jury, in estimating the value of property, *par voie d'expropriation forcée*, could not be revised or reformed except under a writ of certiorari, That case, however, was very unlike this. There was, at least. the appearance and form of a judicial proceeding, but, in this

(1) V. art. 7 *R. J. R. Q.*, p. 277.

(2) 6 *R. J. R. Q.*, p. 137.

case, there is nothing of the kind. It is, as Appellant maintains, an arbitrary assumption of power, contrary to law, and not according to the forms required by law, and it is resisted by Appellant. But, the Superior Court, even in the case last referred to, quashed the certiorari because that was not "*a judicial* proceeding." The result, however, of the appeal to the privy council maintained Beaudry's pretensions, even in in that case, and that too, upon the ground that the justices failed to observe the requirements of law in not hearing the witnesses. This, it should be remarked, is a point, upon which the statute was silent. The common law was held to require it, In the case now under consideration, the requirements of law, not observed, are plainly set forth in the statute, under which the council acted, and the proceedings, instead of being quasi judicial, are entirely of a legislative character. The judgment of the court below seems to have been based upon a misapprehension of Appellant's pretensions. It says: "The Lower Canada municipal and road act, 1855, and its amendments have given to this (Superior) Court no appealable jurisdiction to revise, alter, amend or disallow any by-law passed by any municipal council or corporation, even though such may have been passed illegally, or contrary to the interests and just rights of the parties interested," etc. There is no pretension that the Superior Court has such appellate jurisdiction. The exercise of such jurisdiction is not sought. Respondents undertake to despoil Appellant of his lands, he contests their right to do so. Has not the Superior Court, as a court of original jurisdiction, a right to determine this question? The same municipal act gives power to village councils to determine the weight of bread sold within the municipality; suppose a council prescribes the weight of bread and *price* at which it is to be sold in the same by-law, one part is legal and the other not; the baker complains, but to no purpose; the court has no appellate jurisdiction, and he must submit; or, if the corporation prosecutes the baker for penalty, for violation of the part of the by-law the council had no power to pass, the latter must pay, because no appellate jurisdiction exists in the court, to set aside the by-law. Again, one of the subsections of 23rd section of municipal act of 1855, empowers councils to make "surveys of the municipality." A local council has actually, in one instance, passed a by-law to survey a township of land now in a natural state, and belonging to the British American Land Company, and tax the company to pay the expenses of such survey. This is a township already surveyed. Suppose this council carry out their eccentric notions, and measure out this township into such parcels and quantities as they please, and make a plan of it for settlement, and put the bill of the

whole upon the lands, and forthwith advertise them for sale. The British American Land Company cannot resist a forced alienation of their lands, because the court had no appellate jurisdiction to revise this by-law. Appellant contends that such reasoning in unsound. It is against the practice of courts in England, in the United States, and here. No different issue is raised here, than there would be if the parties' position were reversed, and Respondents were suing for their rates. The only difference is the action in the one case would be affirmative, while in the other it is negative. If Respondents were Plaintiffs, the validity of their proceedings would most unquestionably be tried as an incident to the action. Cases of this kind are too numerous to render authorities necessary. The case of *Gould* vs. *The City of Montreal*, (1) recently before this court, assumed that the Superior Court had a right, in an ordinary action, to determine whether the assessment was legal or illegal. A large number of cases are cited in Angell and Ames, *on corporations*, under chap. 9, relating to by-laws of corporations, where by-laws of municipal as will as private corporations have been declared void, in ordinary actions relating to their enforcement. The necessity of full and special compliance with all legal formalities in depriving individuals of property, for the benefit of the public, will appear to be consistent with the genius of the law of France, on reference to Toullier, respecting *aliénation forcée*. (2) The following is a copy of the judgment, (McCord, J., 25th January, 1860,) from which this appeal is instituted: " The court, considering that the provincial statute, intitled " The Lower Canada municipal and road act," of the year 1855, and its amendments, has given no appealable jurisdiction to revise, alter, amend or disallow any by-law passed by any municipal council or corporation, even though such may have been passed illegally, or contrary to the interests and just rights of the parties interested, and considering that this court can only take cognizance of any alleged illegality, injustice, or irregularity in any by-law made and passed by such corporation, under and by virtue of its supervising power over all inferior tribunals and jurisdictions, therefore, any party, so considering itself injured or aggrieved, can only seek redress under the provisions of the provincial statute, 12th Victoria, chap. 41, and this Court doth, consequently, dismiss the present action, *sauf à se pourvoir*." It may be further remarked, that the necessary consequence of the dictum enunciated in this judgment, is, that a by-law of a municipal corporation which has

(1) Canada jurist, vol. 3, p. 197.

(2) Toullier, tom. 3, p. 166, nº 252 et 100.

been passed by surprise, affecting any absent proprietor, without the observance of those formalities which are specially provided by law to protect his interests, although illegal, spoliatory, and despotic, must be enforced. The revisory power, in the nature of an appeal, instead of being in the Superior Court, is in the Circuit Court, Vide 16 Vic., c. 16, The notices and publication of the By-law rendered necessary, in order that the party interested may appeal to the Circuit Court being omitted, the time elapses, and he is deprived of his rights and property against law and justice. The question involved in this case is much broader than that put in the judgment; it is: Are the arrears of local rates due and payable out of Appellant's lands, for which they can be brought to sale under the Municipal Acts? This is the question to be determined, and Appellant contends that no such rates are due and liquidated so as to enable Respondents to bring his land to sale, even if the By-laws or procès-verbal in question is valid. The question so presented can properly be decided, and only be decided, in an action upon evidence.

Les Intimés: Les Intimés plaidèrent par une défense en droit, et une exception péremptoire, alléguant qu'en supposant même que le rapport de Joseph Duhamel, fait le premier août 1857, et tous les procédés qui l'ont précédé, ou suivi, relativement à la confection du chemin, n'aient pas été précédés ou suivis de toutes les formalités voulues par la loi, les Intimés avaient néanmoins le droit de prélever sur les terres de l'Appelant, la somme d'argent pour le recouvrement de laquelle ses terres ont été annoncées en vente; qu'en supposant que la confection du chemin n'aurait pas été précédée ou suivie de toutes les formalités voulues par la loi, les Intimés avaient néanmoins le droit, d'après la loi, de prélever le coût de la confection du chemin; que l'Appelant, propriétaire des lots de terre, était tenu de faire le chemin, ce qu'il a négligé de faire, que, vu sa négligence, les Intimés en ont ordonné la confection, en observant les formalités prescrites; qu'en supposant que la somme imposée sur ces terres, pour la confection du chemin, excédât, en une année, deux et demi pour cent sur la valeur des terrains, ce qui était nié, les Intimés n'en avaient pas moins droit de la prélever, attendu que l'ouvrage en question était un chemin de front, dont la confection était ordonnée longtemps avant; que l'Appelant ne pouvait obtenir la nullité d'une vente future. Par une autre exception, les Intimés plaidaient: Que l'Appelant n'a jamais résidé dans les limites; que le chemin, dont la confection a été ordonnée, était un chemin de front que, par la loi, le propriétaire était obligé de faire sur le front de ses lots, même en l'absence d'aucun procès verbal, et la municipalité avait le droit de le faire pour

le propriétaire, et d'en réclamer le coût de lui, à titre d'arrérages de taxes municipales. Par une troisième Exception, les Intimés alléguaient: que le procès-verbal fait par Louis Reneaud Blanchard, le 19 novembre 1852, a été amendé par celui de Joseph Duhamel, le 1er août 1857, et ce procès-verbal, ainsi que tous les procédés qui l'ont suivi ou précédé, ont été accompagnés de toutes les formalités prescrites par la loi et duement homologués; qu'en n'interjetant pas appel au Conseil Municipal du comté de Bagot, le seul permis par la loi relativement à telle homologation, l'Appelant y a acquiescé; que, le 1er mai 1858, l'ouverture du chemin ayant été demandée, la Municipalité en a ordonné la confection, suivant les dispositions du procès-verbal, et, par suite, le propriétaire des lots était tenu de faire la partie du chemin qui se trouvait sur le front des lots; que ce chemin n'ayant pas été fait dans un délai raisonnable, la municipalité a donné ordre aux officiers compétents de faire faire le chemin; que, le 19 juillet 1858, après avis légal, le chemin a été mis à l'enchère et adjugé, et la proportion de tel chemin, pour laquelle l'Appelant était tenu et obligé, ayant été fait et payé par la municipalité ou ses officiers, ils avaient le droit d'en réclamer le coût, comme arrérages de taxes municipales dues sur les lots de terre, ainsi qu'elle l'a fait: que le chemin était avantageux, utile et nécessaire, et a été ordonné dans l'intérêt du plus grand nombre des intéressés, et tous les procédés de la municipalité ont été réguliers, et tels que prescrits par la loi. Le 25 janvier 1860, la cour rendit jugement et renvoya la demande, sur deux raisons principales: Parce que l'acte municipal de 1855 ne donne à la Cour Supérieure aucune juridiction en appel ou en révision des règlements passés par les conseils municipaux, et en second lieu, parce que le procédé que le Demandeur devait suivre en pareil cas était celui indiqué par la 12 Vic. ch. 41, savoir: le statut réglant la procédure relativement aux Corporations. Ce jugement est conforme à la loi, et le seul que la Cour Inférieure pouvait rendre. Les règlements que l'Appelant met en question sont réguliers, étant rendus par l'autorité compétente, et dans les attributions du Conseil municipal qui les a promulgués. Pour remédier aux abus que tel règlement peut occasionner, pour prévenir l'injustice qui pourrait en résulter, des moyens sont donnés par l'acte municipal lui-même. Ils sont faciles et mis à la disposition de tous les intéressés. L'Appelant pouvait s'en prévaloir, et il ne l'a pas fait. Des avis publics sont donnés avant la préparation d'aucun procès-verbal. Les parties sont entendues, les objections prises en considération. Le conseil local en discute le mérite. La partie lésée pouvait appeler de la décision au conseil de comté. Après ces divers degrés de juridiction épuisés,

si les pouvoirs que la loi confère à ces corporations ont été outrepassés, si les dispositions de la loi qui leur a donné naissance ont été violées dans l'exercice de leurs pouvoirs, la loi a, par le statut cité, savoir, l'acte 12 Victoria, chap. 41, sagement établi un moyen d'y porter remède, avec des garanties qu'exige le bon fonctionnement d'un système municipal. Suivant ce statut, la partie lésée par un règlement municipal peut obtenir, s'il y a lieu, de la Cour Supérieure un ordre d'en suspendre l'effet ou l'exécution. Cette injonction est donnée par la cour Supérieure, ou par deux juges sur un exposé des faits attestés par affidavit. On conçoit que c'est là une sage précaution. Cet ordre ainsi donné est une information des irrégularités, une protestation, une mise en demeure sanctionnée par un jugement préliminaire d'une autorité judiciaire : faits graves qu'une corporation doit peser avant de passer outre. Si l'exposé fait aux juges est vrai, si la corporation n'est pas en mesure d'en détruire l'exactitude ou la valeur légale, en procédant ultérieurement avant d'obtenir une nouvelle décision, elle le fait à son péril et en assume toute la responsabilité. Peut-on donner le même effet à une simple action en nullité, sans que la partie qui l'exerce se soit en aucune manière prévalue des moyens de révision ou d'appel que la loi accorde ? Si une simple action, sous de pareilles circonstances, suffit pour mettre en question la légalité des procédés d'une corporation, sans autres formalités, il sera toujours permis à un seul individu de paralyser toute action de la part des corps municipaux. Au milieu de la confusion de nos lois municipales soumises à des révolutions périodiques et à des modifications continuelles, il n'y a pas une seule corporation qui puisse acquérir la certitude de la parfaite légalité de tous les procédés prescrits par des dispositions souvent contradictoires de nos statuts. Si l'action de l'Appelant est admise, toutes les corporations seront arrêtées par une simple action du genre de celle de l'Appelant, dans les matières les plus importantes et les plus urgentes. Il semblerait plus raisonnable et plus conforme à la loi de présumer un acquiescement formel de la part de toute partie intéressée, et induire une renonciation à se prévaloir d'aucune informalité, lorsqu'aucune objection n'a été faite à un règlement publié et annoncé, après l'expiration des délais accordés par la loi pour en appeler et en obtenir la révision. En admettant même la légalité du procédé suivi par l'Appelant ; en supposant qu'il pouvait suspendre l'exécution d'un règlement municipal par une action directe en nullité, il n'y avait assurément aucune raison valide pour motiver la nullité du procès verbal et des règlements municipaux, rien qui pût faire prononcer la nullité de la vente des propriétés de l'Appelant. L'art avec lequel

l'Appelant a divisé ses raisons ferait illusion à leur simple lecture, si par l'examen on ne découvrait l'inapplicabilité des différentes clauses du statut qu'il invoque. Il faut remarquer d'abord que le point de départ des règlements et de toute la contestation n'est pas le procès verbal Duhamel, le seul que semble reconnaître l'Appelant, mais bien, au contraire, le procès verbal fait par Louis Reneaud Blanchard, le 19 novembre 1852, procès verbal qui a subsisté jusqu'à ce qu'il fût amendé sur le rapport ou procès verbal de Joseph Duhamel, en date du 1er août 1857. Le premier subsiste et doit être apprécié au point de vue des anciennes dispositions de nos lois de voirie ; la loi municipale ne s'appliquant qu'à ce dernier. Tous les propriétaires de terres sont tenus par la loi de faire leur chemin de front. Il n'est besoin d'aucun procès verbal pour définir cette obligation, la loi y a clairement soumis tous les propriétaires. Un procès verbal n'est requis que pour les routes. La Sec. 45, 18 Vic., ch. 100 dit : " S'il n'existe aucun " procès verbal, règlement ou ordre valide *prescrivant le con-* " *traire*, alors, le chemin de front de chaque lot sera fait et " entretenu par le propriétaire ou l'occupant du dit lot.... " Mais le propriétaire ou l'occupant d'un lot ne sera pas " tenu de faire ou entretenir plus d'un chemin de front " sur la largeur de ce lot, à moins que tel lot n'ait plus de " trente arpents de profondeur." D'après cette disposition, la cour ne devait pas prendre connaissance des informalités qui pouvaient exister dans le procès verbal, attendu que, dans l'absence même d'aucun procès verbal, l'obligation de faire et d'entretenir le chemin de front subsistait toujours. La seconde partie de la clause du statut en dernier lieu cité explique pourquoi le chemin de front est mis à la charge des seuls propriétaires du 20ème rang exclusivement. C'est que, dans toute cette partie, les propriétaires du 19ème rang ont ouvert et fait leur chemin sur le dix-neuvième rang. Leurs terres comme toutes les terres des townships n'ayant que vingt-huit arpents, tombent par là dans l'exception du statut qui les exempte de toute participation dans l'ouverture d'un second chemin de front, à moins qu'il soit à plus de trente arpents du premier. On concevra facilement que la seule désignation d'un chemin de front sur le vingtième rang était suffisante pour indiquer aux intéressés où devait être tracé le chemin. Les procès verbaux sont en outre plus explicites qu'il n'est nécessaire pour l'intelligence d'un devoir municipal aussi clairement défini et prescrit par la loi et l'usage. L'objection de l'Appelant sur ce point est frivole. La nécessité de ce chemin, s'il n'était pas commandé par la loi, est démontrée par la preuve. Plusieurs propriétaires du Township de Milton n'avaient aucune sortie, si ce n'est par un long circuit, et l'ouver-

ture de ce chemin qu'ils avaient droit d'exiger leur était indispensable. La Municipalité devait veiller à leurs intérêts et voir à l'exécution de toutes les obligations municipales, et particulièrement l'ouverture et l'entretien des chemins. " La muni-
" cipalité est tenue de faire et entretenir tous les chemins et
" ponts qui y sont situés.... et passible de dommages résultant
" de la non-exécution de toute obligation imposée par cet
" acte." (18 Vic. ch. 100, sec. 51, § 3 et 4. L'Appelant se plaint de ce qu'il n'a reçu aucun avis. Si le statut impose aux propriétaires l'obligation de faire le chemin de front l'avis ne peut être exigé. Nonobstant, la cour trouvera dans la preuve qu'un avis a été donné à l'agent de l'Appelant, l'Honorable Hollis Smith, qui lui-même a obtenu un amendement au premier procès verbal. Un autre grief ou moyen de nullité, sur lequel il appuyait sa demande en Cour Inférieure, et qui n'a pas plus de fondement que ce dernier, est l'absence de cotisation. Une cotisation est nécessaire lorsqu'il s'agit de faire contribuer par parts proportionnelles un certain nombre d'individus, dans un ouvrage commun, mais non lorsque le travail ou l'obligation requise se trouve, quant à sa nature et à son étendue, parfaitement définie et est une obligation individuelle. Si la confection du chemin de front est obligatoire, et qu'à défaut du propriétaire de l'exécuter, la municipalité est tenue de l'exécuter, il ne peut pas y avoir lieu, dans ce cas, à une cotisation, mais uniquement au remboursement de ce qu'il en a coûté à la municipalité ou à l'officier de voirie agissant au nom de la municipalité. Qu'on envisage même ces procès-verbaux comme indispensables pour l'ouverture de ce chemin, on trouvera encore que toutes les formalités prescrites par les statuts en force, lorsqu'ils ont été rédigés et sanctionnés, ont été accomplies, et les informalités que l'Appelant indique sont quelques-unes imaginaires, d'autres empruntées à des statuts subséquents, ou à des dispositions complètement étrangères ; par exemple, l'absence d'avis : La Cour les trouvera dans la procédure accompagnant les procès-verbaux et les règlements ; la largeur du chemin de 26 pieds, tandis que l'acte municipal exige 36 pieds, objection que l'Appelant déduit d'un statut postérieur de plus de quatre ans au procès-verbal fixant la largeur du chemin en question. La description de la nature de la contribution n'est exigée par la loi que pour les routes. L'exemption de la construction du pont, si la Compagnie du Grand Tronc n'en pouvait être chargée exclusivement, ne peut certainement pas motiver la nullité du procès-verbal. Car l'obligation est d'abord et premièrement à la charge des intéressés qui n'en sont libérés qu'à la condition que le chemin de fer en puisse être chargé seul, question qui n'était pas alors décidée. Lorsqu'on vient ensuite à exami-

ner la plainte de l'Appelant relativement au coût du chemin, l'on trouve que le prix est modéré, que le tout a été fait au meilleur marché, après des soumissions, et rien ne peut justifier le reproche fait aux autorités municipales d'avoir cherché à extorquer des sommes considérables d'un particulier absent pour l'avantage de quelques résidents. Si la somme réclamée de l'Appelant est considérable, cela est dû exclusivement à ce qu'il se trouve propriétaire de la plus grande partie du Township. Loin de lui avoir été préjudiciable, il est établi que ce chemin a ajouté le double de la valeur à ses propriétés.

MEREDITH, J. : Of the objections urged by Appellant, the two which seem to be of the greatest weight are firstly : That the Respondents had no right to make the second order, namely, that of 3rd May, 1858, with respect to the homologation of the *procès-verbal* of the road in question, without notice to the parties interested. The section 49 (No. 2), of the 18 Vict., cap. 100, provides that every Municipal Council, before proceeding to the examination or revision of any *procès-verbal* " shall cause public notice to be given through their " secretary-treasurer, to the inhabitants of the municipality or " municipalities interested in the work to which such *procès-* " *verbal* relates, of the day, hour and place, at which the " Council shall proceed to the examination or revision of such " *procès-verbal.*" Section eight of the same statute defines how such notice shall be given. In conformity to these provisions of the statute, Defendants gave notice of the time and place at which they were to proceed, for the first time, to the examination and revision of the *procès-verbal* in question : and, upon that occasion, namely, on the 7th day of December, 1857, they homologated the *procès verbal ;* subject however to a proviso in these terms : " Que le dit chemin, au lieu d'être " fait dans le temps mentionné au dit rapport, ne le sera que " lorsque ce Conseil en sera requis par les intéressés au dit " chemin, et lorsqu'il le jugera nécessaire." Some months afterwards, a petition was presented to the Council by three persons, alleging themselves to be proprietors of land in the 19th range of Upton, and praying that the road in question might immediately be made. This petition bears date the 1st of May, 1858, and, two days afterwards, without, on this occasion, hearing any of the parties bound to make the road, and without notice to any of them, the Municipal Council made an order in the following terms : " Il est ordonné que l'amen- " dement au rapport du député fait et passé à ce Conseil le 7 " décembre dernier (1857,) soit par les présentes annullé, et " que le dit chemin soit fait tel qu'ordonné par le rapport du " député de ce conseil en date du 1er août 1857." Without wishing to enter at any length into the question of the rea-

sonableness of the order thus made, I may observe that, according to that order, the parties had less than two months to make the road to which it refers: whereas, counting from the date of the *procès verbal*, the parties under it would have had nearly a year to do the same work; and, as regards Appellant, the effect of the second order was to require him, in less than two months, to make a road which costs $1609.40. On the part of Appellant, it is contended, that, by the 49th section of the 18 Vic., cap. 100, the Municipal Council of Upton were bound to give public notice before they proceeded again to the consideration of the *procès verbal* in question; and that, as they did not do so. that *procès verbal* can not be considered to have been legally homologated. And, in support of this view, it may be said, that the order homologating the *procès verbal* was not, in reality, the first order, which postponed the doing of the work, but was the second order which required the work to be done; and which second order was made without any notice to the parties. On the other hand, it may be answered, that, as the Council did give notice of the time and place at which they were to proceed to the examination of the *procès verbal*, and, therefore, that they did all the law required them to do, that the reconsideration of the *procès verbal* was a proceeding within their own discretion, in relation to which the statute did not subject them to any formalities. and, therefore, that the want of a notice of the second meeting ought not to be deemed fatal. I think it would have been more in accordance with the spirit of the law, if the Council, before finally ordering the work to be done, had afforded the parties interested an opportunity of being heard with respect to the change proposed to be made in their first order; and, had this been done, it is note probable that the Council would have required Appellant to make, in less than two months, a road which has cost $1609.64. But, as a second notice was not required by the letter of the statute, and, as the *procès verbal* in so far as relates to the road in question, merely required the performance of a duty to which the parties would have been equally bound, if there had been no *procès verbal*, I think we cannot say it was necessary, *à peine de nullité*, to give notice of the meeting at which the *procès verbal* was reconsidered, and the second order made. In fact, the first order of the Council relieved Appellant, for a time, from a common law liability, and the second order changed the first, only in so far as it was an indulgence to Appellant. The other of the two objections urged by Appellant, to which I have alluded, has reference to the manner in which Respondents caused the work in question to be done. Under the 60th sec-

tion of the statute, the "*overseer of roads*" could have caused "the work to be done by some other person;" and, in that case, the overseer might have recovered the value of the work done, from Appellant, with 20 per cent in addition thereto, and costs of suit, as a debt due to such overseer," or such amount might have been levied "as arrears of taxes due to "the municipality in the manner hereinafter provided." (1) If the municipality had caused the front road of Appellant to be made in the manner directed by the foregoing section, it appears they would have had a right to recover the value of the work in the manner attempted in the present instance. But, instead of causing the road to be made as the law directs, by the *overseer of roads*, the Municipal Council ordered the *inspector of roads* to sell the making of the road by auction, "*au rabais, suivant la loi;*" and this accordingly was done. In making this order the Council seem to have had in view the 64th section of the statute (18 Vic., cap. 100,) which sanctions the proceeding so ordered, "in the execution of the County works;" but there is nothing in the statute to authorize the pursuing of that course in a case such as that before us, where the work was to be done by private individuals. It may be said that Appellant has no interest in complaining of the work having been given out by contract, if it was done at as low a price in that way, as it could have been done at any other. That is true, but what Appellant has a right to complain of is, that the Municipal Council having made his road in a manner different from that prescribed by law, have advertised his lands for sale, without any judicial proceeding, and have thus excluded all enquiry as to whether he has, or has not suffered by their deviation from the law, and, here, it may be observed that there is a very important difference between the position of a road overseer causing work to be done under the 60th or 61st section of the statute, either by the day or by the job; and the position of an officer of the Municipal Council acting under a positive order of the Council, directing him, at a particular time, to dispose, without reserve of work by public auction, to the lowest bidder, in the manner provided by the 65th section of the statute. In the first case, the officer is bound to exercise his discretion with respect to the reasonableness of the prices to be given; whereas, in the second case, the officer cannot exercise any such discretion. The effect, therefore, of the order of the Council directing the making of the road to be disposed of by auction, was to deprive Appellant of the advantage of the discretion which it is to be presumed the road overseer would have exercised had

(1) V. art. 397 et 398 C. M.

the work been done by him. Again, if the work had been done as the law requires, by the road overseer, and that that officer, either from fraud or neglect of duty, had paid more for the work than he ought to have done, Appellant would have had his recourse against the overseer, whereas, that officer has been discharged from all responsibility as to the cost of the work by the course pursued by Respondents. It may also be observed that there seems to be a good reason for the distinction made by the legislature allowing county works to be adjudged by auction to the lowest bidder, without, at the same time, allowing work which ought to have been done by a private individual to be given out in the same way. Where the performance of a county work is disposed of by auction, a number of persons have an interest in attending at the sale, and seeing that the work is adjudged at a reasonable price, but, where the work to be done is of a private nature, and, as often is the case, is chargeable against a single person, if he happen to be absent, his interest may be wholly unprotected; and in such a case, he would have to pay, *not according to the value of* the work done, but according to the *price* which the persons present at the auction thought *fit* to charge. The legislature may declare that a party chargeable for work shall pay for it, not according to its value, but according to what other persons may be willing to offer to do it for, and this irrespective of the reasonableness or unreasonableness of their offer, but no power less than that of the legislature can cause the liability of a person in default to be determined in a way such as that just mentioned, and the legislature have not done so with respect to cases such as that before us. The statutory power given in certain cases to municipalities of selling the land of persons indebted to them, without any judicial proceeding on that behalf being necessary, is one of an unusual and exceptional character, and a municipality seeking to exercise such a power, ought to follow carefully the course prescribed by the legislature. Respondents have not done so in the present instance; on the contrary, they have cause the work to be done in a manner differing materially from that directed by the statute, and I, therefore, think they are not entitled to the exceptional remedy of selling the lands of Appellant merely by their own authority. Let the Respondents bring an action for the costs of the work done; if, in such an action, it be proved that the work, in consequence of its having been done in manner different from that ordered by the Statute, has not cost more than it ought to have cost, Respondents will recover the full amount of their claim, and, if on the other hand, it be proved that the sum expended is more than the work would have cost

had the directions of the statute been pursued: then Respondents will be entitled to recover, not the cost price, but the reasonable value of the work done for Appellant. But Respondents cannot be allowed first to make the road in a manner different from that in which the statute directs: and then to sell the lands of Appellant by an exceptional proceeding which would deprive Appellant of any opportunity of shewing that he is really aggrieved by the irregularities of which he complains in the proceedings of Respondents. As to the remedy adopted by Appellant, after giving the point my best consideration, I cannot concur in the view taken in this part of the case by the learned Judge in the Court below. It seems to me that, if Respondents had no right without a judgment of a competent court to sell the lands of Appellant: that the latter must have a right to put a stop to the illegal proceedings of the former, and, if Appellant had a right to stop these proceedings, I know of no other means by which he could effectually have enforced that right, than by an action in the Superior Court, to the superintending and reforming power of which "all bodies politic and corporate in Lower Canada," are by law expressly subjected. The learned counsel for Respondents contended that, even if Appellant had reason to complain, his only remedy is that given by the 8th section of the 12th Vict., cap. 41. But Appellant could not have obtained redress under that provision of law, without the intervention of Her Majesty's Attorney General, and I am certainly not prepared to hold that the intervention of the Attorney General can be necessary to prevent one party from illegally putting up to public auction, under colour of law, the property of another. I therefore think that Appellant is entitled to the reversal of the judgment of the Court below.

MONDELET, J.: Appellant conceiving that the corporation, Respondents, unduly and illegally, by taxation and advertissement of sales of several of his lots of land, had wronged him, instituted, after due Protest, an action against Respondents, alleging a *trouble de droit* in the possession of his lands and oppression, and concluding that Respondents be condemned to desist from troubling Appellant in the peaceable possession and enjoyment of his lands; that said lands be declared free from all municipal assessments and burdens, dues and penalties: that Respondents be condemned to desist from the sales of said lands, and pay Appellant damages in $2000. This action was met by a two-fold pretension, 1st. No such right of action, proceedings of the corporation supreme, no other course than an appeal to the County Council. 2nd. Proceedings of Respondents, regular and legal. As to the first question, it may simply be remarked that Respondents, as a corpo-

ration, possess none but exceptional powers: if they have transcended those powers, their proceedings are null and should be treated as such; consequently, Appellant need not either appeal to the County Council or bring the case before the Superior Court under the operation of the 12th Vict. ch. xli.; he may at once complain of the *trouble* he has met with at the hand of the corporation, treat their proceedings as nullities, and pray as he has by his conclusions. As to the second pretension set up by Respondents, it is untenable. 1. The procès verbal not having been regularly homologated, for want of necessary notice, must go for nothing, besides, the road being ordered in a definite way, and it being anything but explicit, is not susceptible of properly being carried out; 2. The principle of thus trying such questions by an action has already been recognized, viz. in the case of *Gould* vs. *The Corporation of Montreal;* I am of opinion that the judgment of the Court below should be reversed and the action of Appellant maintained.

"The Court, seeing that Defendants caused the road work mentioned in the pleadings fyled to be performed by disposing of said road-work by auction, *au rabais*, as appears by the order made by the Municipal Council of the municipality of the parish of St. Ephrem d'Upton, on 28th June, 1858, and also by the return of Olivier Tremblay, an officer of said council, bearing date the 19 July, 1858, and considering that, according to the laws in force in Lower Canada at the time of performance of said road-work, and more particularly under "The Lower Canada Municipal and Road act 1855," Defendants were not authorized to cause said road-work to be performed in said manner; and that, although Defendants may have a right to recover from Plaintiff, in the ordinary course of law, the fair and reasonable value of the work which they Defendants so caused to be performed on the lands of Plaintiff, in consequence of Plaintiff not having caused said work to be performed, yet, that Defendants had not a right, of their own authority, merely and without the intervention of any judicial proceedings, to sell the lots of land belonging to Plaintiff upon which Defendants had so caused said road-work to be done, as Defendants appear to have done by causing said lots of land to be advertised for sale in the Canada Gazette, as mentioned in Plaintiff's declaration, and, considering, therefore, that Plaintiff had reason to complain of the proceedings taken by Defendants for the purpose of selling said lots of land of their own authority, and that Plaintiff had a right of action to have said proceedings on the part of Defendants declared illegal, and to prevent Defendants from illegally selling said lots of land belonging to him; and, considering, the

refore, that, in the judgment of the Court below, dismissing Plaintiff's action instituted for the said purposes, there is error; the Court doth, in consequence, reverse the judgment of the Court below, to wit: the judgment rendered by the Superior Court, at St. Hyacinthe, on 25th January, 1860, and proceeding to render the judgment which the Court below ought to have rendered in the premises, doth hereby declare Appellant to be the lawful proprietor of the lots and portions of land in his declaration described and mentioned, and that the advertisements which Defendants have caused to be inserted in the Canada Gazette respecting the sale of said lots of land belonging to Appellant are illegal, and Defendants are hereby adjudged and condemned to desist from troubling Plaintiff in the peaceable possession and enjoyment of said lots of land by assuming to cause the same to be sold without judicial authority, and to desist and wholly surcease from the sale of said lands, or any portion thereof, and to pay to Appellant 5 s. cy. as and for damages by him sustained by the wrongful acts of Respondents in the premises." (5 *J.*, p. 229 et 11 *D. T. B. C.*, p. 344.)

SANBORN and BROOKS, for Appellants.

SICOTTE and CHAGNON, Counsel.

LAFLAMME, LAFLAMME and DALY, for Respondents.

AUCTIONEERS.—GUARANTEE.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 5th September 1861.

Coram Sir L. H. LAFONTAINE, C.-J., Bart., AYLWIN, J., DUVAL, J., MEREDITH J., C. MONDELET, J.

JOHN SINCLAIR, Plaintiff in the court below, Appellant, *and* JOHN LEEMING et al., Defendants in the court below, Respondents.

Held: That an auctioneer is bound to deliver to his principal the notes he may have received for the goods he has sold, whether he guarantees the sales or not.

That, if he sells goods for his principal, on purchasers' note, he has no right to accept from the purchaser a note in which the price of goods belonging to another party is combined.

That the most reasonable interpretation of an agreement to guarantee sales, where notes are given, is, the Guarantor's liability to indorse them.

On the 2nd May, 1860, at Montreal, Defendants sold, at auction, on behalf of Plaintiff, 55 boxes of tobacco. Fifteen boxes were sold for cash, viz. $235, $\frac{60}{100}$; 25 boxes to White

and Turber, for their note of $383.21, payable on 5th September following: 6 boxes to L. Chaput & Co., for their note of $72.62, payable 5th August following; and 10 boxes to Schneider and Bond, for their note of $162.68, payable 5th September following. After the sale, Plaintiff (Appellant) agreed with Defendants to pay them a "guarantee commission" on the sales. Appellant, in his declaration, alleged that he agreed to pay this "guarantee commission," in order that these notes should be endorsed by Defendants; and that, by law, and the custom of trade, they were consequently bound to pay him, on demand, the cash they received, and the notes, with their name endorsed thereon. Defendants pleaded that they never undertook to indorse the notes; that, by charging a guarantee commission, they were only liable as sureties in default of purchasers paying; that the term of credit was of 4 months, which term of credit had not expired, at the institution of the action. That never, prior to sale, did Defendants agree to guarantee the sale, but, subsequently to sale, Defendants agreed to guarantee the sale, but did not undertake to indorse purchasers' notes, nevertheless, prior to the institution of the suit Defendants tendered a promissory note of White and Turber, for $383 and 21 cents, being the amount of their purchase and endorsed by Defendants; also the promissory note of Plaintiff, for $222 and 22 cents, payable 3 months after 2nd May last, and indorsed by Defendants, and the sum of $192 and 5 cents in cash, in full satisfaction of sales. They, therefore, tendered in court the amount of said sales in cash, prayed that said tender be declared good and action dismissed. Defendants further pleaded that the matter in issue had been referred by them and Plaintiff to the Board of Trade, and that said tender had been in accordance with the decision of the Board thereon. Plaintiff specially answered that the decision of the Board of Trade was to the effect that Defendants were bound to indorse and deliver to him the paper they had received for the tobacco, or other paper indorsed by them and acceptable to Plaintiff, which decision they had refused to abide by, and, therefore, this action was instituted. At enquête, Plaintiff proved the sale of the tobacco, and the receipt by Defendants of the cash and notes; and Defendants' agreement to "guarantee the sales." He adduced witnesses who proved that it was the custom, when an auctioneer guarantees a sale in which promissory notes have been taken from the purchasers, for the auctioneer to indorse his name on the notes, and deliver them so indorsed to the merchant for whom he sold. Defendants examined an auctioneer and three others, who were or had been in their employ, and who testified that, according to their experience, it was customary for the

auctioneer to retain the purchasers' notes, and give his own in their stead to the principal. Judgment of the court below : (1) " Considering that Plaintiff hath failed to establish, by evidence, any undertaking by Defendants to indorse the notes of the purchasers of the 55 boxes of tobacco, hath failed to establish, by any law or by any custom of trade, an obligation on the part of Defendants to indorse said notes, in the absence of any undertaking or agreement so to do, and, further, considering that Defendants, have offered, to pay the total amount of the purchase money of the fifty-five boxes of tobacco, less the necessary expenses of Defendants incurred on the sale thereof, and that, furthermore, Defendants have deposited the amount in court. The court doth declare the tender good and valid, and doth order the amount to be paid to Plaintiff, and doth condemn Plaintiff to pay the costs of the said action. From this judgment Plaintiff appealed.

POPHAM, for Appellant : The *commencement de preuve* of this contract of guarantee consists of Respondents account of sales, wherein the charge for " Guarantee commission " is made. This is a commercial technicality, taken literally, it is unintelligible, and must be explained, like any other technicality, by those whose business, or profession require its use. 3 Chitty, *Comml. Law*, 108, 109, 323 ; Fell, *Mer. Guar.* 62. The weight of evidence is in favor of Plaintiff's interpretation of the contract, and, if there be a doubt upon this point, it should be against the guarantor. Chitty, *Cont.* 95 ; Burge, *Suretyship* 46 ; Fell, *Mer. Guar.* 105 ; Story, *Agency* N. 74. But, if Respondent's interpretation be taken still the judgment of the court below was erroneous. Appellant, after the sale and upon demand was entitled to the proceeds of the sale of his property ; namely, to the cash received, and to the notes, whether Respondents were bound to indorse them or not, or whether they guaranteed them or not. Had no guarantee been stipulated, it is admitted the notes belonged to Appellant. Respondent's pretension to treat the payment of an additional commission as a reason for claiming a right to retain possession of the proceeds of Appellants property, and thus actually diminish the value to be derived by Plaintiff for such additional guarantee commission is manifestly unreasonable and absurd. No legal tender of the cash or notes was made previous to the action ; and the tender of the full amount of the sales in cash subsequently, is also defective, as it was unaccompanied by a tender of costs.

CARTER, for Respondent : The Plaintiff has set up in his declaration : 1. An agreement, on the part of Respondent

(1) Smith, J., 31st October, 1860.

to indorse the notes; 2. That, by the usage of trade an agreement to guarantee a sale implied the indorsation of the notes. No such contract has been proved, and the alleged usage of trade has been contradicted by Respondent's witnesses. Respondents acted under a *del credere* commission. Therefore, they could not be held liable as *Co-obligés solidaires* with the purchasers by indorsing the notes. They were only bound to pay after the expiration of the term of credit, on the non-payment by the purchaser. Story, *Cont.*, 543; I. Savary, p. 574; Persil, *sur achat et vente*, p. 11.

MEREDITH, J.: The questions raised by the pleadings are firstly: Had Defendant a right to withhold from Plaintiff the notes received for his goods; 2ndly. If Defendant had not that right then have they made a sufficient tender in this cause; 3rdly Had Plaintiff a right to require Defendants to indorse the notes in question, in the manner prayed in his declaration. Defendants have cited numerous English cases, for the purpose of establishing the pretension advanced in their exception, namely, "that, by charging a guarantee commission, "they did not become liable except as sureties in case of "default of the purchasers." The doctrine established by the more recent cases, upon which Defendants rely, is given in a note in Dunlop's Paley's *Agency*, in the following words: "a factor or broker acting under a commission *del credere*, is "a surety to his principal for the solvency of those with "whom the principal deals through his agency. He is, in no "case, as regards his own employer himself the principal, in "any case which he may make for him, and is liable only in "default of those with whom he deals. It follows, therefore, "that, before he can be charged, it must be averred and "proved that the principal debtor has made default." According to the foregoing authority, Plaintiff is to be considered as having, through the agency of Defendants, sold his goods to White and Turber, Léandre Chaput, and Schneider and Bond, and Defendants, in addition to being the agents of Plaintiffs, are sureties in his favor for the debts so due by the principal debtors. Such is the position for which Defendants contend, not only by the authorities which they cite, but also by their pleadings, in which they expressly allege that they are merely sureties with respect to the debts in question, and further allege in effect that the purchasers of the goods are the principal debtors; and, admitting, as from the pleadings on both sides, I think we safely may, that the position for which Defendants thus contend, is their true position, I ask on what possible grounds can Defendants, either as agents of Plaintiff, or as sureties in his favour, for the debts due by White & Thurber, Chaput & Co,, and

Schneider & Bond, retain notes given by those persons for the debts so due to Plaintiff. It is perfectly plain that a surety who has not paid the debt for which he is liable, has no claim to, and therefore, cannot legally retain negociable paper representing that debt ; and it is equally plain that an agent who has received negotiable paper for a debt due to his principal, is bound to hand over such paper to his principal. On a point of this kind, it can hardly be considered necessary to cite authorities, but still as practically Defendants have denied their liability, in this respect, I may refer to Parsons, *on Contracts*, vol. 1, p. 78, where the writer says : " if he " (a factor under a *del credere* commission) " takes a note from " the purchaser of goods, this note belongs to his principal." If it be said that Defendants have not contended that they had a right to retain the notes in question, the answer is obvious. We have to consider not merely what Defendants have said, but what they have done ; and we find that they kept the notes in question from the time they were given, until they matured, and were paid; and of this Plaintiff had just reason to complain. Assuming then that Defendants had no right to withhold from Plaintiff the notes received for his goods, we have next to consider whether the tender made by them to Plaintiff was sufficient ; and I am of opinion that it was not, because Defendants had no right to tender the paper of Plaintiff not due, in place of the note of Léandre Chaput & Co., for $72 ; inasmuch as in the ordinary course of trade, Plaintiff could not raise money merely upon his own paper; whereas, in the ordinary course of trade, Plaintiff could with his own indorsement have raised money upon the note of Chaput & Co. I do not think it necessary for the purposes of the present case to express any decided opinion upon the sufficiency of the tender, as regards the note of Schneider and Bond ; because, as the case now presents itself, the question is one of costs merely, and, if the tender be bad for any considerable part then Plaintiff ought to recover his costs, but, I may say that it seems to me, that Defendants, having as the agent of Plaintiff, sold his goods to the extent of $162 to Schneider and Bond, had no right, whether acting under a *del credere* commission or not, without the consent of their principal, to blend that debt with one due to another person, and to take one note for the whole. For these reasons, I am clearly of opinion that the tender made by Defendants to Plaintiff was insufficient. The argument before us turned mainly on the question as to the obligation of Defendants to indorse the paper they had received for Plaintiff's goods ; but, as the case now presents itself, the question is one of costs only ; and that question probably could be disposed of with-

out deciding upon the liability of Defendants to give their indorsement, as contended for by Plaintiff; for, although Plaintiff's demand included a claim for Defendant's indorsement, it also, and necessarily included, a claim for the notes themselves; and, if Defendants, as I think I have shown, illegally withheld the notes belonging to Plaintiff, and have failed to make any lawful tender of the notes themselves, or of any equivalent for them, then Plaintiff, even on these grounds, would be entitled to his costs; but, as this was not, at least, the main ground upon which the case was submitted to us, I pass to the consideration of the third question, as to whether Plaintiff had a right to call upon Defendants to indorse the notes in question. in the manner prayed in his declaration. If Defendants, when they sold Plaintiff's goods, as his agents, had taken promissory notes in favour of Plaintiff, a question might then have been raised as to the form in which the notes had been taken, and as to the liability of Defendants to indorse the notes so taken. But Defendants contending, as they did in effect, that they had a right to hold the notes, took them in their own favour. Now, if it be plain, as I think it is, that Plaintiff had a right to the notes representing his own goods, and if Defendants, as the agents of Plaintiff, have taken these notes in such a shape as to make the transfer of them to Plaintiff impossible, otherwise than by the indorsement of Defendants, then Defendants have imposed upon themselves the obligation of indorsing the notes; for, it is impossible to suppose that Defendants can be allowed to deprive Plaintiff of the use of notes belonging to him, merely by making these notes payable to themselves instead of to their principal to whom they belonged. I therefore, think that independently of the usage relied on by Plaintiff, he was entitled to the notes in dispute, endorsed as he claimed them; and, as regards the alleged usage, I may observe that it appears to me to be perfectly reasonable; for, where a merchant undertakes to guarantee a debt, represented by negotiable paper, the most effectual and business-like way of giving the guarantee, is by the indorsement of the paper representing the debt; but, at the same time, I must add, that I agree with the learned judge, in the court below, in saying, that that usage, however reasonable it may be, is not so proved in this cause as to enable us to rest our judgment upon it.

AYLWIN, J.: The person for whom an auctioneer acted was the master of the produce of the sale. He could only do with the goods that for which they were entrusted to him. Suppose apples were sent to him for sale, but, before the sale, the owner should change his mind and desire to withdraw them, could the auctioneer say no, I will not give your barrel of

apples, but I will give you a barrel of pears, or, some other thing worth as much money? clearly not. And so, after the sale, he could not claim the right to give any other thing than the produce of the sale. The Board of Trade had given a very fair decision. The court below had taken an erroneous view. Respondents had endeavored to establish the impossibility of giving the purchaser's notes in some cases, from the fact of the price of goods belonging to different parties being frequently embodied in one note, but the auctioneer has no right so to mix up the transactions of his principals.

"The court, seeing that Respondents, as auctioneers, sold, for and on behalf of Appellant, and as his agent, the fifty-five boxes tobacco mentioned in the Plaintiff's declaration, at the time, for the prices and to the persons in said declaration mentioned; seeing that Respondents received on account of the sale, so made by them, for fifteen boxes of the tobacco $235.60, in ready money; and from Whyte and Thurber, for for twenty-five boxes, their promissory note for $383.21; and from Chaput & Co. for five boxes, their promissory note for $72.62, and that the remainder of the tobacco, to wit, five boxes, was sold by Respondents to Schneider and Bond, for $162.68, and, considering that, as the two promissory notes and ready money, were received by Respondents, as the agents of Appellant, and as the proceeds of the sale of his property, they Respondents were bound to pay over to Appellant, as their principal, the two promissory notes and ready money so received by them, less the commission and charges payable to Respondents in respect of the sale. And, considering that, although after the tobacco had so been sold by Respondents, Appellant agreed to pay them an extra commission, in consideration of their undertaking to guarantee the due payment of the price of the tobacco, yet that the agreement was not intended to have, and, in law, had not the effect of impairing the security of Appellant for the payment of the debts so due to him, by giving his agents, Respondents, a right to withhold from him, as their principal, the ready money and promissory notes which they had so received, as part of the proceeds of the sale of his goods. And, seeing that, by the tender made by Respondents to Appellant, on the fifteenth day of June, 1860, Appellant, was illegally required to accept his own negotiable paper, not then due, in lieu of the note of L. Chaput & Co.; it is, in consequence, considered and adjudged that the tender so made by Respondent is illegal and insufficient. And, considering that, as Respondents illegally withheld from Appellant the two promissory notes and ready money, to which Appellant was so entitled, and as Respondents did not, on account and in lieu of the last mentioned pro-

missory notes and money, make any legal or sufficient tender to Appellant, he Appellant was entitled, not only to the sum of $802.87, tendered and deposited by Respondents, and which has been ordered to be paid to Appellant by the judgment of the court below, but also to interest on that sum from the 5th day of September, 1860, when said sum of money became payable, and also his costs in the court below. And, considering that, in the judgment of the court below, which doth not grant Plaintiff any interest, and which condemns him to pay costs, there is error, doth, in consequence, reverse the judgment rendered by the Superior Court, at Montreal, in this cause, on the thirty first day of October, 1860, and, proceeding to render the judgment which the Superior Court ought to have rendered, doth adjudge and order that the sum of $802.87, so deposited by Res,.ondents, be paid over to Appellant, and Respondents are, jointly and severally, condemned to pay to Appellant interest on that sum, from the fifth day of September, 1860 until this day, and also the costs of Appellants as well in this court as in the court below." (5 *J.*, pp. 247 et 347.)

J. POPHAM, for Appellant.

H. Stuart, Counsel.

CARTER and GIROUARD, for Respondents.

CURATOR TO VACANT ESTATE.—CONTRAINTE PAR CORPS.

SUPERIOR COURT, Montreal, 30th March, 1861.

Coram SMITH, J.

WOOD *vs.* MCLENNAN, *cur.*

Held: That a curator to vacant estate, who has been ordered to deposit with the prothonotary the balance shown on the face of his account to be in his hands, before contestation of such account or final judgment thereon, is not *contraignable par corps* for non compliance with such order. (1)

This was a motion for *contrainte par corps* against Defendant, a curator to a vacant estate, who, in an action to render account, had fyled his account, showing an apparent balance in his hands of £413, 1 9½. This amount he was ordered, by an interlocutory judgment, to deposit in the hands of the prothonotary; Plaintiff reserving his right to contest the account. Defendant failed to comply with the order, and Plaintiff now moved for a writ of *contrainte par corps* against him.

PER CURIAM: The Defendant, in obedience to a judgment,

(1) V. art. 686 et 2272 C. C.

had rendered an account as curator, showing that he was indebted to the estate in the sum of £400. The Plaintiff had given notice of his intention to contest this account, but, in the meantime, had obtained a judgment ordering Defendant to pay the money admitted to be due. This he had not done, and an application was now made for *contrainte par corps* against him, under the ordinance of 1667. This ordinance gave that remedy after a final judgment, but not as a means of enforcing an interlocutory judgment. The Plaintiff, at present, had nothing but his *droit exécutoire*. Until the account was *débattu*, there could be no *contrainte par corps*, and Plaintiff must therefore take nothing by his motion. Motion rejected. (5 *J.*, p. 253.)

A. and W. ROBERTSON, for Plaintiff.

LEBLANC and CASSIDY, for Defendant.

SUMMONS.

SUPERIOR COURT, Montreal, 30th March, 1861.

Coram SMITH, J.

GUEVREMONT *vs.* LAMÈRE, fils, *et al.*

Held.: That a writ of summons addressed to "any of the bailliffs of the Superior Court for the district oi Montreal *or* Richelieu," in a case where the Defendants are stated to be some in the one district and others in the other district, is good, and that it is not necessary to sue out two original writs, the one addressed to the bailiffs of the one district, and the other addressed to the bailiffs of the other district. (1)

This was a hearing on the merits of an exception *à la forme*. The writ of summons stated that one of Defendants was in the district of Montreal, and that the others resided in the district of Richelieu, and was accordingly addressed to any of the bailliffs of the Superior Court for the district of Montreal *or* Richelieu. And Defendants thereupon fyled an exception *à la forme*, by which they in effect contended that the writ was null, because there was no such officer known as a bailliff of the Superior Court for the district of Montreal *or* the district of Richelieu, and that the proper and only legal mode of procedure in a case like the present, was to sue out two writs, one addressed to the bailiffs of the one district, and the other addressed to the baillifs of the other district.

PER CURIAM : The point raised arose from the circumstance that there were two Defendants in the suit, both of whom reside at Sorel; but one happening to be at Montreal, was

(1) V. art. 48 C. P. C.

there served with the summons. Defendants now alleged that there ought to have been as many writs of summons as there were different districts in which Defendants had to be served. This was not so. In writs directed to the sheriff, such as writs of revendication, capias, *saisie*, &c., it was plain that there must be as many writs as there were districts into which the process was to go, because they were the sole authority on which sheriffs employed the bailiffs. But this was not the case with writs of summons which might be given to any of bailiffs, whose commission ran into all districts. Exception dismissed. (5 *J.*, p. 253.)

P. R. LAFRENAYE, for Plaintiff.

CARTER and GIROUARD, for Defendant.

RULES OF PRACTICE.

SUPERIOR COURT, Montreal, 28th February, 1861.

Coram BERTHELOT, J.

MACFARLANE *vs.* MCCRAKEN, and MCCRAKEN, Opposant.

Held: That in default of proof that the rules of practice of the Superior Court prepared and signed on the 17th December, 1850, have been registered in the district of Gaspé, the court here will not apply such rules to any act done within that district. (1)

This was a motion to reject an opposition *à fin d'annuller* fyled by Defendant, on the ground that it was not supported by an affidavit such as provided by the 80th rule of practice. The opposition was made and signed in the district of Gaspé, in connexion with a seizure made in that district on a writ issued from Montreal, and was fyled in the office of the sheriff of Gaspé. There was also an affidavit of Defendant annexed to the opposition, which purported to have been sworn before a commissioner of the Superior Court at Gaspé, merely swearing to the truth of the facts alleged in the opposition, without containing the other important assertions required by the rule of practice invoked.

PER CURIAM: There is no proof that the rules of practice in use in this court, including the rule relied on by Plaintiff, have ever been registered in the district of Gaspé, within which the opposition in question was made and fyled and the affidavit attached was sworn to. Now, by the 2nd sub-section of the 148th section of chapter 83 of the consolidated statutes it is distinctly enacted that the rules of practice prepared by the judges of the Superior Court shall only have force and

(1) V. art. 29 C. P. C.

effect in each district when registered. In the absence therefore of proof of their registration in Gaspé, I cannot apply them to any act done there. Motion rejected. (5 *J.*, p. 254.)

BETHUNE and DUNKIN, for Plaintiff.

CROSS and BANCROFT, for Opposant.

WILL.

COUR SUPÉRIEURE, Montréal, 11 janvier, 1853.

Coram SMITH, J., VANFELSON, J., MONDELET, J.

DUBÉ *et ux. vs.* CHARRON DIT DUCHARME.

Jugé : Que le défaut de mention expresse de la présence des témoins lors de la lecture du testament au testateur, n'entraîne pas la nullité du testament, si d'ailleurs cela appert par équipollence des termes. (1)

Les Demandeurs, par leur action, demandaient la nullité du testament de Orélie Bonin, reçu le 29 mars 1838, en la paroisse de Sainte-Elizabeth, devant Rolland, notaire et deux témoins ; parce que ce testament ne pouvait valoir ni avoir aucun effet ; " attendu, qu'il n'appert pas et qu'il n'est point fait " mention, dans le testament, qu'icelui ait été lu et relu à la " testatrice, et ne lui a pas été lu et relu en présence des deux " témoins y mentionnés." Ce testament était rédigé quant à sa partie attaquée, comme suit : " Ce fut ainsi fait, dicté et " nommé par la testatrice au notaire soussigné, en présence " de.... témoins pour ce requis et appelés, et à la testatrice " par le notaire lu et relu, qu'elle a dit bien entendre, et y a " persisté, en la paroisse de...." Le Défendeur prétendit que le testament avait été accompagné de toutes les formalités requises par la loi en force au pays lorsqu'il a été fait, qu'il était bon et valable, et devait être reconnu tel par la cour, et que l'action des Demandeurs était en conséquence mal fondée

SMITH, J. : The question raised in this cause is of importance to the parties, but not difficult. The action is *en nullité de testament*, to set aside a *testament notarié* as informal and illegal. It has been admitted by the parties, that all the formalities have been complied with, except one requiring the will to have been read and re-read to the testator in the presence of the witnesses, as it is contended that no *mention thereof* has been made. For the validity of the will, is there sufficient evidence on the face of it, that the will has been read and re-read in the presence of the witnesses ? Here is the diffi-

(1) *Vide*, Ricard, *don. part.* 1ère Nos. 1502, 1518 ; Pothier *don. test.*, ch. 9. Règle 21 ; Daguesseau, lettre du 30 Déc. 1742 ; Sirey 1815, p. 157—1817. 1ère part. p. 31. V. art. 843 et 844 C. C.

culty. The only question is whether there is a sufficient *mention* that this formality has been accomplished as required by law. By the 289th article of the Custom of Paris, the reading of the will in the presence of the witnesses is imperative, *à peine de nullité*. The 972nd article of the Code Napoléon, is to the same effect. What then should be the precise form of words used to answer the requirements of the law? In referring to the ordinance of 1735, *sur les testaments*, as reproducing the old jurisprudence, to the Code Napoleon and to the opinion of Chancellor Daguesseau, it is evident that the law does not require certain sacramental words, if only the substance be exactly preserved. Some jurists have asserted that there should be a precise form of words, and some have maintained that legal intendment was sufficient, but the *Cour de Cassation* has, at last, settled the whole matter, some years ago, on the principle now to be adopted by this court. To the will under consideration the authorities referred to, clearly apply. The words in the conclusion of the will do not say that it has been *lu et relu*, in the presence of the witnesses, but it is a fair inference from the words and must be considered sufficient. The court must necessarily suppose with Toullier, (1) that the different formalities mentioned in the conclusion of the will have been duly performed at the same time. There is another point which goes to clear up all doubt upon the question submitted. The notary and witnesses attested by the will that it had been *read to the testatrix*. The court is of opinion that this is in accordance with the authorities in Merlin, *questions de droit*, vo. *testament*, sec.; 13, where a satisfactory discussion of the question is to be found. There is another ground in favor of the will; Plaintiff, by her contract of marriage, has acknowledged the existence of the will. It is true that she was a minor when she married, but, until she complains in a special form of action, the will as ratified by her, must stand.

"The Court considering that Plaintiffs have failed to establish, by legal evidence, that the last will and testament of Orélie Bonin, sought to be annulled and set aside by the present action, by reason of the absence of the formalities required by law, to constitute a testament solennel, is, in fact, as alleged, informal and therefore null and void. And further considering that said last will and testament is in all its essential requirements conformable to law, as possessing all the requisite formalities required to constitute a *testament solennel*, and that from the whole tenor of said last will it appears that said last will and testament was *fait dicté et nommé et approuvé par la testatrice, et lu et relu en présence des té-*

(1) 5 vol. Toullier, p. 414, Nos. 426 to 433.

moins, and that sufficient legal mention thereof is made in said will. And, further, considering that Plaintiff hath, by her contract of marriage with Hilaire Dubé, her husband, dated the 24th day of June, 1851, acknowledged the existence of said last will and testament, thereby, in law ratified said will. Doth dismiss the action of Plaintiffs. (5 *J.*, p. 255.)

PICHÉ et LAFLAMME, avocats des Demandeurs.

CHERRIER, DORION et DORION, avocats du Défendeur.

COMMUNAUTE DE BIENS.

COUR SUPÉRIEURE, St. Hyacinthe, 24 septembre 1861.

Coram BADGLEY, J.

GADBOIS *vs.* BONNIER dit PLANTE.

Jugé : 1° Que l'adultère de la femme, durant le mariage, ne peut être l'objet d'une fin de non-recevoir de la part de l'héritier, pour lui faire perdre ses droits de communauté ;

2° Que cette fin de non-recevoir ne peut être plaidé que par le mari ;

3° Que si le mari ne s'est pas pourvu contre elle durant son vivant, pour la faire déclarer déchue de ses droits matrimoniaux, l'héritier est non-recevable à le faire ;

4° Que l'absence de la femme du domicile conjugal, et son défaut de collaboration durant le mariage, pour *cause légitime*, ne la privent pas de ses droits matrimoniaux après le décès de son mari ;

5° Qu'entr'autres causes légitimes de cette nature, le fait que le mari a vécu en concubinage dans sa propre maison, est suffisant pour autoriser sa femme de vivre séparée de lui ;

6° Que, dans un tel cas, l'abandon du mari à son lit de mort par sa femme, est justifiable.

BADGLEY, J. : Action by Assignee of the widow of J. B. Plante, of St. Denis, for a moiety of the real property described in the declaration as her share of the *Communauté de Biens* between her and the deceased, and for the *fruits et revenus* of her moiety from her husband's death. The action is *au pétitoire* against Defendant, as a collateral heir of the deceased, and also in his own right, as assignee of his co-heirs. The declaration sets out the marriage of the parties, the acquisition of the common property of which this realty was part, the decease of the husband intestate, the *qualités* of Defendant and his co-heirs, their making of the inventory of the estate and subsequent partition of the real property amongst them, and the acquisition by Defendant from his co-heirs of their shares of the property in question, the notarial assignment by the widow to Marcel Guertin and his notarial re-assignment to Plaintiff. Defendant admits his possession of the property, and claims to retain it as his property under valid titles ; he excepts against Plaintiff's

demand, the adultery of the wife, during her husband's life, her absence from her husband during almost all their married life, and especially at his death, her want of collaboration in the acquisition of the community property, and finally the fraudulent nature of the assignments from want of consideration. Plaintiff takes issue upon these exceptions, and replies the late husband's ill treatment of his wife during their cohabitation, his departure with her into a foreign country, after about two year's residence at St. Denis, and after a couple of months, under a false pretext, abandoning her there, without means or support of any kind, except her own manual labour; his return to and and establishment at St. Denis, his concubinage there with a strumpet who lived with him in his house, as his wife, until her death, not very long before his own decease, and that he never, during his life, assisted his wife or recalled her home, or sent her the means to return to him. The evidence is oral and documentary, and also under a Com. Rog. to the State of New-York, where the wife resided during her abandonment, and establishes the following facts: that the deceased Plante resided at St. Denis, at his marriage with his wife, a minor who was only 14 years of age, that they lived there for 2 or 3 years, and then he took her with him to live in the State of New-York, *that he abandoned her there, without means of support, under a false pretext*, after a couple of months residence there, and returned to St. Denis, where he established himself, and where he soon lived in adulterous intercourse with prostitutes, and especially with one Leclaire Bélanger, who lived and slept with him in his house, for a number of years until her death, which preceded his by a few years; that he denied his wife's application to him to bring her home, or to send her means to return, and, at all times, expressed his aversion and dislike of his wife and his satisfaction that she was not with him; and that he could satisfy his passions with other women without the fear of a family who might come, if his wife cohabited with him, and would prevent his loaf from going as far as if he were alone: On the other hand, his wife applied to him to bring her back, and, for 6 or 7 years, continued working with her hands for a precarious subsistence living all the time virtuously and in the esteem of her neighbours, until, her health failing, she was advised to adopt a frontier custom, and form a connection with another man which she did, and lived with him alone for 20 years leaving several children at her death; she knew of her husband's concubinage before she formed this connection. The property in contest was acquired in 1824 and 1834, by purchase, under notarial deeds. The inventory of the estate made by the co-heirs shews a considerable amount of

property, and that, in its partition, the four brothers and sisters of the deceased assumed the estate ; that Defendant was one of the brothers and bought out the shares of his co-heirs in the property in question : that the deceased husband died at St. Denis, 19th January 1847, the inventory was made on 15th March of same year, the partition of the immoveable property, amongst the collaterals, was made 14th November, 1848, the widow assigned her rights in the community to Marcel Guertin, 14th March, 1847, who protested against these collaterals, on the 6th July, 1847, and finally assigned to Plaintiff, 29th November, 1849. It must be added that the deceased appeared, at all times, to have entertained an idea of his wife's right to a share of this community property, that he frequently expressed himself in that way, and that, with this notion on his mind, he died intestate. There are two main points in this cause, to which reference will be had, without considering the other points pleaded, such as Plaintiff's bad faith, &c., which are not substantiated, Viz : 1st. The wife's adultery during coverture ; and 2nd. Her alleged abandonment of her husband, during his life-time, without cause, including her absence from his death-bed, and her want of collaboration in the acquisition of the community property. Upon the first point, the wife's adultery, the authorities are numerous and conclusive, that such a *fin de non recevoir* cannot originate or be set up by the heirs of the deceased husband : the infraction of the marriage vow is a moral wrong from which he alone suffers and of which he alone can legally complain : his neglect or determination not to do so during his life leaves her scatheless and her heirs are without right. It is even component for him to condone her guilt and to take her back impure as she may be, to his bosom. Such a marital condonation removes the guilt altogether. First point. The collateral heirs of the deceased husband cannot plead the wife's adultery, as a *fin de non recevoir* against her claim for share of community. 1. *Dict. des Arrêts*, p. 81, vo. *Adultère*, pour accusation par le mari. Cette accusation appartient au mari, parce que *actio de moribus ultra personam mariti non potest extendi, nec in heredam datur, nec tribuitur hæredi, hæres enim morum correctionum non habet*, L. 15, § 1, *Soluto matrimonio*, Bacquet, 2e part. *Droits de Bâtardise*, ch. 12 ; Coquille, *Inst. au Droit Français*, *Tit. du Douaire, in fine* p. 82, n° 29, l'héritier du mari quel qu'il soit, n'est point recevable d'accuser la femme d'adultère, pour la priver de ses conventions matrimoniales si le mari ne s'est jamais plaint en justice, ou n'a recommandé à ses héritiers de s'en plaindre. Il en est de même de l'héritier de la femme, contre lequel tel mari ne peut point opposer l'adultère de la

femme, pour s'exempter de la restitution de sa dot. Lapeyrère, 1717, *lett.* A No 22. No 36, si le mari ne s'est point plaint de son vivant, ses héritiers ne peuvent opposer à la femme qui répète sa dot qu'elle a commis l'adultère. Arrêt 9 Mai 1585, Anne Robert, No. 1, ch. 14, Louet, *Lettre* I, Som. 4. Après la mort du mari, ses héritiers ne peuvent intenter accusation d'adultère commis pendant son mariage contre l'honneur du défunt, mais bien exciper de l'accusation commencée par le mari, et pour s'exempter du paiement du douaire demandée par la veuve, M. Bouguier, *Lett.* A, No 2, en rapporte un rendu en la Chambre de l'Edit. de 1609. Voyez Ricard, *Donats. entre vifs*, part. 1, ch. 3, sect. 8. 38. Héritiers du mari qui avait accusé sa femme d'adultère, et était décédé dans le cours de la poursuite (criminelle) sont maîtres de la reprendre pour la faire condamner. *Arrêt, Robes Rouges*, 24 Dec., 1622. *Arrêts d'Augeard*, liv. 3, ch. 64. 1 Brodeau, sur *Louet*, p. 871 ; Arrêt du 2 Février, 1589, qui a débouté la fille qui demandait à être reçue à la preuve de l'impudicité de sa belle mère. Notes. Que le mari ne s'était point plaint de son vivant, ce qui dénie l'action à l'héritier, quand le mari a eu temps suffisant pour s'en plaindre ; car, en ce particulier, il n'y a que le mari qui soit recevable à arguer sa femme d'impudicité, et à intenter l'action : le mari que l'on trouve curieux de préserver son honneur et celui de sa maison, n'intentera pas aisément cette action, il serait périlleux de la réserver en la personne de l'héritier, lequel, par témoins, sur l'espérance du profit ou vengeance qu'apportent les deux lits, mettraient en hazard l'honneur et les biens d'une femme. Ainsi arrêt du 14 Mars, 1620, conforme, and several others in the notes. Lacombe, *Recueil de Jur.*, Vo. *Adultère*, p. 11, No 2 : Mari seul peut intenter l'action, ses héritiers le peuvent continuer, s'il n'y a désistement de la part du mari, etc. Guyot. *Rép.*, Vo. *Adultère*, p. 197 : Nous avons dit qu'en France le mari seul pouvait accuser sa femme d'adultère. Cette maxime y est tellement observée, que par arrêt du 18 Juillet, 1665, il a été jugé qu'un père ne pouvait, malgré son fils, accuser sa belle fille d'adultère. Les héritiers du mari ne peuvent pas non plus intenter l'accusation d'adultère contre sa femme, lorsqu'il ne s'est pas plaint lui-même de son vivant. Ils seraient pareillement non recevables à objecter l'adultère, par forme d'exception à la femme, qui demanderait ses reprises et conventions matrimoniales, comme l'ont jugé deux arrêts des 9 Mai 1585, et 14 Mai 1620. Il y a même un arrêt du Parlement de Bretagne, du 7 Juin 1725, par lequel les héritiers d'un mari ont été condamnés à partager la communauté avec sa femme qu'il avait fait enfermer pendant 5 ans pour sa mauvaise conduite, quoiqu'ils invocassent que, depuis que son mari l'avait reprise, elle s'était retirée à Paris

avec un invalide, dont elle avait eu des enfants durant un voyage dans lequel son mari était mort. Pothier, *Douaire*, No 250 : La principale cause pour laquelle une femme est privée de son douaire, est le crime d'adultère. Il faut pour cela qu'elle aurait été déclarée convaincue par sentence du juge sur la plainte intentée contre elle par son mari. Lorsque le mari n'a pas donné de plainte de son vivant, les héritiers du mari ne sont pas recevables de l'intenter, ni à offrir la preuve de l'adultère de la femme pour se dispenser de lui payer son douaire. See also Pothier, *Cont. de Mar.*, 6 part., ch. 3, art. 2. See Toullier. See Merlin, Vo. *Adultère*, to the same effect. Lorsque, sur la plainte du mari, la femme a été déclarée coupable d'adultère, il en resulte pareillement, avec la séparation de biens, dissolution de la communauté, et la femme n'a aucune part et n'en peut prétendre dans la communauté. See also Allemand, *Tr. du Mariage*, p. 84, modern legislation to same effect. The substantial exception of adultery by the Defendant, and the proof made to support it, are not sustained by the authorities. There remains the 2nd plea, the wife's absence from her husband during his lifetime and at his death. The principle of law applicable to this point is, that, if a wife abandon her husband without cause, and live apart from him, she loses her right in the community from the time of her departure. This principle has the advantage of a provincial decision in appeal (2 *R. J. R. Q.*, p. 86, *Desbarats* vs. *Lehoullier*). In that case, the married parties had compromised her action of *séparation de biens* by a deed of separation under which she received an annuity during her life. The property involved in that cause was acquired by the husband, after the execution of the deed of separation, but it was held that the separation being voluntary she could claim no share in the property of the communauté after her separation, upon the principle that *une absence sans cause par la femme du domicile de son mari la déchoit de son droit dans les biens acquis par le mari depuis le temps de son absence*, this reference is made solely in connection with the principle stated above. The authors show the ruling upon this point. 1. *Jour. du Palais*, p. 154; Henrys, *Arrêt à Paris*, 20 janv, 1672 : La cause de la veuve de Pierre Roi, dans laquelle la question était si une femme ayant quitté son mari par légèreté, sans l'avoir même assisté à la mort, peut, après son décès, demander part en la communauté ; l'arrêt accorde à la femme droit de communauté jusqu'en l'année quand elle s'est séparée de son mari et la déchoit du surplus : dans cette cause, il n'y avait que séparation d'habitation sans jugement quelconque. The appeal from that judgment was dismissed, because : 1° lorsque la société de demeure est requise comme condition essentielle pour pouvoir recueillir un bien,

la séparation et le divorce l'en empêchent ; c'est une maxime du Droit Coutumier que pour gagner douaire en Normandie, il faut que la femme soit avec son mari lors de son décès, si elle n'y est pas, elle le perd, et, en Bretagne, in such cases, *douvrium non debet :* in that case, it was argued, contre la femme, " ce que ces coutumes disposent à l'égard du douaire doit, à plus forte raison, avoir lieu à l'égard du droit de communauté, parce que le douaire est une libéralité qui passe à la femme, à titre purement lucratif, mais le droit de communauté ne s'acquiert qu'à titre onéreux : il faut pour en mériter les avantages, que chacun y contribue ses peines, ses dépens, ses pensées, et si une femme n'a pas assez d'industrie pour acquérir de son chef, du moins elle doit, par son économie, sa bonne conduite et sa vigilance, conserver ce que son mari a acquis par de longs travaux. See also Papon, *Com.* on 233 art. of Bourbonnais ; dans cette cause, en appel, la femme a quitté son mari par caprice, après 25 ans d'habitation avec lui, et elle a refusé de revenir avec lui, quoiqu'il l'ait sollicitée ; la simple séparation par caprice et légèreté a dû la priver des profits de la communauté, mais la communauté de biens n'est qu'une suite et une dépendance de la société des corps, duquel Chopin a inféré ce principe : " Donc la femme qui s'enfuit par caprice, doit être privée de son droit de communauté, car celle qui renonce à la plus honnête société de la vie, en quittant la compagnie de son mari, est réputée avoir bien plutôt quitté la communauté de biens qui n'est qu'accessoire ;" aussi une pareille question à celle-ci s'étant présentée en ce Parlement, le 12 février 1619, elle fut décidée conformément à ce principe ; dans cette cause, elle demande une séparation qu'elle avait eue et qu'elle avait exécutée pendant la vie de son mari. Cet arrêt est rapporté au 1er *Dict. des arrêts* vo. *Absent*, p. 29, No 40, où il se trouve un autre, au No 39. Arrêt du 19 Octobre, 1581, qui déclare une femme indigne de son douaire, etc., pour avoir, sans cause ni occasion valables, abandonné son mari longtemps avant et lors de son décès. Guyot, Rep, vo. *absent*, p. 67 : Une femme qui se serait absentée de la maison de son mari malgré celui-ci dont elle aurait été réclamée, ne pourrait, dans son absence, prétendre part dans la communauté après la mort de son mari ; réfère à l'arrêt de la veuve Roi ci-dessus. Pothier, *Douaire*, No 257 : Une seconde cause pour laquelle la femme doit être privée de son douaire est, lorsqu'elle a abandonné son mari : Pothier cite les articles des coutumes de Normandie et Bretagne, et ainsi conclut, " les dispositions de ces coutumes étant fondées sur l'équité doivent être observées partout." 5 Poullain du Parc, p. 319 : La femme qui ayant quitté son mari sans aucun motif légitime, n'est pas avec lui au temps de sa mort, perd son douaire, arrêt du 17 août, 1758, rapport de Grimaudet, quand

même elle ne l'aurait pas quitté par débauche. 7 Nouv. Denizt., vo. *femme*, p. 543, No 6 : la femme doit vivre et demeurer avec son mari : c'est une obligation que lui imposent et le droit naturel et le droit civil. No 7, elle ne peut avoir d'autre domicile légal que le sien quoique par le fait elle réside ailleurs. No 9, la femme qui abandonne son mari, sans cause raisonnable, doit être privée de son douaire, etc. 1 *Jour. du Parl. de Bretagne*, ch. 62, p. 302 : Un mari ayant fait renfermer sa femme dans une maison de filles repenties, et l'ayant reçue chez lui après une clôture de cinq ans, sans avoir formé de plainte en justice pour ses débauches, l'héritier de ce mari n'est pas recevable à à la preuve des débauches de la femme avant et depuis la mort de son mari pour la priver de sa part à la communauté ; par sentence des juges de S. Malo du 14 janvier, 1724, il fut ordonné à Martin, le Défendeur, héritier du mari, d'avouer ou contester s'il avait disposé des effets de la cammunauté. Appel de cette sentence ; par son action, elle demande partage de la communauté au dit Martin, frère et héritier de son mari. En plaidant pour l'Appelant en appel, argué, que les mots *autres avantages provenant de son mari* doivent s'entendre de la participation à la communauté ; pour l'Intimée, il était argué, que d'Argentré, sur l'art. 429 de l'ancienne coutume, a été d'avis de priver la veuve de sa part de la communauté, lorsqu'elle a vécu impudiquement et que son mari s'en est plaint, mais son sentiment n'a pas été suivi. Les mots, (en latin) que les réformateurs ajoutèrent par compliment pour lui, on ne peut entendre que les donations, et toutes acquisitions provenantes de la libéralité du mari. La communauté n'est pas sans doute de ce genre. Sentence confirmée le 13 juin, 1725. 14 *Jour. du Palais*, p. 405 : La continuation de communauté a lieu au profit des enfants mineurs lors de la mort de la mère, faute au mari d'avoir fait inventaire, et il est non recevable à opposer, par exception, l'adultère habituel de sa femme et sa fuite avec son ravisseur, n'ayant fait aucunes poursuites d'adultère contre elle avant sa mort. Dans cette cause, est ce qui suit : La mère était morte en 1734, la demande de sa fille était en 1750 ; Exception, pendant son absence pour son voyage de long cours, prostitution de sa femme et un adultère habituel. Objections, 1, prescription de 5 ans ; 2, disposition de l'art. 450 ; 3, que l'article prive la femme adultère du douaire, de la donation, etc., ce qui, disait-elle, ne comprend pas la part de la communauté, mais ce 3e moyen contraire au sentiment de d'Argentré et au droit commun du royaume, n'a déterminé, en aucune manière, la décision de la cour. Arrêt du 7 juin, 1725. No 293 : On a beaucoup agité la question en Bretagne de savoir si l'adultère de la femme la prive de sa part dans la communauté, parceque le 450e art. de la Cout. ne parle que de la perte des

douaires, donations et autres avantages : ils pensent par ce que dit Poullain du Parc dans son *Jour. du Parl. de Bretagne*, tom. 4, ch. 89, que l'on y tient aujourd'hui pour certain que l'adultère autorise la perte de la part dans la communauté. La *Cout. de Normandie*, arts. 376. 377, dit *si elle n'était avec lui lors de son déces*, ce qui se doit entendre quand elle a abandonné son marî. 1 Bourjon, *Tit.* 16, ch. 3, No 1 et note : Comme ce crime, (l'adultère) lui ferait perdre son douaire qu'on regarde comme des aliments, a plus forte raison doit-il la rendre indigne de partager les fruits du travail de son mari : cet effet de l'adultère, par rapport au douaire, est attesté par Loysel, du *Douaire*, Règle 39. Coquille, *Quest.* 147. Les *arrêts de Lamoignon, Tit. du Douaire*, art. 43. Ce qui prouve d'autant plus sa juste privation du droit dans la communauté. Voyez aussi arrêt du 29 mars, 1718, rapporté au long par Denizart, vo. *adultère*. Il juge que la femme, convaincue d'adultère perd tous ses droits de communauté, son douaire, son préciput et autres avantages à elle faits par son contrat de mariage. Elle recouvre ses droits dans la communauté, etc., si son mari la reprend, c'est réconciliation qui efface tout ce qui la précède. Duplessis, 429 : Celle qui quitte son mari sans cause perd son droit de communauté du jour qu'elle a abandonné son mari, ce qui reçoit cependant l'exception qu'on a expliquée et qui se réduit à une légèreté de femme, qu'on ne doit pas si rigoureusement punir ; ce qu'on approfondira par le chapitre qui suit. From these authorities it is manifest that a wife *commune en biens*, who, from caprice and without reasonable cause, abandons her husband and lives apart from him, loses her right in the *communauté* from the time of her departure from him. But these authorities require that the abandonment shall be the act of the wife and that it shall be without reasonable cause, but, if otherwise, she shall not suffer : Le Nouv. Denizart, Vo. *Femme*, par. 9, dit, " mais s'il était prouvé que l'absence de la femme a une cause légitime, elle ne serait pas privée de son douaire. Ainsi jugé, arrêt du 16 janvier, 1742, dans l'espèce duquel, la femme s'étant retirée chez son père, à cause des mauvais traitements de son mari, y etait restée pendant 18 ans, jusqu'à la mort du mari," (Vo. *Absence de la femme qui abandonne son mari*, p. 67) 5 *Poullain du Parc*, p. 420 : " mais si les mauvais traitements de son mari, capables d'opérer une séparation de corps, ont causé la fuite de la femme, elle ne doit pas être privée de son douaire ; il en est de même si une absence légitime, pour cause nécessaire, empêche la femme de remplir ce devoir." *Arrêts* du 7 juillet, 1738, ch. 36, du *Recueil d'Arrêts* par Lacombe. 1 *Bourjon*, Tit. 10, ch. 3. No. 3 : Si la femme, par une légèreté d'esprit et par l'inconstance qui lui est assez naturelle, a quitté la maison de son

mari pour vivre séparément, elle ne perd pas pour cela, et dans la thèse générale, son droit dans la communauté, c'est une juste indulgence accordée à sa faiblesse, ce qu'on a déjà observé, et qu'il est à propos de reprendre ici pour l'examiner plus au fond. Le Brun, *Com.* p. 476, No. 29. Cela a lieu à plus forte raison s'il y a séparation d'habitation respectivement *volontaire* et fait de concert, en ce cas, le droit de la femme dans la communauté reste dans toute sa force : telle séparation qui n'a de bâse que la volonté des parties, non la loi ni l'autorité de la justice, ne pouvait donner atteinte au droit de communauté, qui est un droit acquis à la femme. NOTA : Tel est sur ce l'usage du Chatelet, où on l'admet en ce cas au partage de communauté : je l'y ai toujours vu ainsi pratiqué. No. 5 : Mais si telle séparation ne s'est pas faite par la seule légèreté d'esprit de la femme, et qu'elle ait ajouté à cette légèreté une espèce d'indignité en abandonnant son mari tellement qu'elle ne l'ait pas assisté à sa mort, en ce cas, elle doit être privée de son droit dans la communauté du jour de la séparation, de fait, ce n'est plus légèreté, c'est l'indignité qui doit produire cet effet. *Arrêt*, 20 janvier 1672, 2 *Soëfve.*, Cent. 4, ch. 64. Pothier, *Douaire*, No. 257 : Observez néanmoins que, pour que la femme qui a quitté son mari soit privée de son douaire, il faut que ce soit contre le gré de son mari qu'elle l'ait quitté, et qu'il lui ait fait sommation juridique de revenir avec lui à laquelle elle n'a pas déférée, mais si c'est du consentement, au moins tacite de son mari, qu'elle ne demeurait pas avec lui, ce qui se présume, lorsque son mari ne s'en est pas plaint judiciairement, elle n'est sujette à aucune peine. 1 Guyot, p. 69, Vo. *Absent:* L'absence du mari qui abandonne sa femme, a l'effet d'une séparation de biens exécutée, comme l'ont jugé différents arrêts, entr'autres, *Journ. du Parl.*, de Paris, du 12 décembre 1754, et la communauté s'est provisionnellement dissoute du jour de la demande. 1 Anc. Denz., Vo. *Absent*, p. 24, No. 30 : Aucune loi n'a décidé la question de savoir si la communauté se continue lorsque l'un des conjoints s'absente, mais on peut voir en cela, l'arrêt du 20 janvier 1672, 3 *Jour. des Aud.*, la veuve Roy, ci-dsssus cité. 6 *Coutumes* de Bretagne, p. 218 : Femme qui laisse volontairement son mari, et s'en va avec un autre, et n'est avec son mari au temps de sa mort ; et enfin si elle le laisse et ne fait son devoir de le garder, et elle le peut faire, au cas que le mari ne la réforcerait jaçoit qu'elle ne s'en aille avec un autre, elle ne doit être endouairiée. Art. 451, Notes sur ce texte : Renusson, *Douaire*, ch. 12, No. 4. Com. Basnage, Art. 376-7. Bretonnier, sur Henrys, pl. 15 : 1. Femme qui quitte son mari perd son douaire. 2 Exception s'il y a faute du mari, p. 219, No. 2, ce qui se doit entendre quand elle a abandonné son mari sans causes raisonnables,

etc., mais si le divorce advient par la faute du mari, ou de tous deux, elle aura son douaire. Normandie, 977, Vo. la *Communauté*, No. 4, et l'art. 1. Qui des deux conjoints aura donné cause de divorce, soit par adultère ou autrement, perdra tout avantage de mariage, tant coutumier que conventionnel, 2. Distinction entre l'abandon du mari et l'absence légitime, p. 220, No. 2, la simple absence n'est pas avoir quitté son mari. 5. p, 221 : "Ou que le mari ne la refuserait." S'il refuse de voir sa femme, s'il rebute ses soumissions et les offres de son devoir, elle est excusée. Mais il peut la refuser, pour des causes légitimes, par exemple, *propter adulterium aut insidias*, 1 *Arrêt*, Ve. Duclos, ayant agi pour son douaire, l'enfant du premier mariage contesta le douaire, parce qu'elle n'était pas avec son mari, lorsqu'elle mourut. Elle répondit que son mari l'avait chassée de sa maison plusieurs années auparavant, que par ses mauvais traitements il l'avait obligée d'obtenir, le 13 janvier, 1660, un arrêt qui l'autorisait à vivre hors de la maison du mari, et une pension de 2000 livres de rente, que d'ailleurs il était tombé malade dans une auberge à Rennes, qu'il ne le fut que quelques jours, qu'elle était éloignée de 30 lieues, qu'elle partit aussitôt qu'elle eut connaissance de sa maladie que l'héritier affectait de cacher, mais qu'elle ne put arriver à Rennes que quelques jours après sa mort. *Arrêt* du 16 juillet 1661, le douaire fut assigné. 2 Basnage, *Norm. Arts.* 376-7, pp. 50-51 : Il faut même recevoir favorablement les excuses de sa retraite, surtout si la colère, la débauche, et la mauvaise conduite de son mari lui en ont fourni le sujet. Now, it is manifest from the evidence, that the wife was the abandoned party, and that all the blame of the separation rests with the husband. But beyond all this, the vile conduct of the husband is a legal excuse for the wife : could he expect a decent woman his wife, to live in the same house, consort at the same bed and board with a common prostitute kept by him, such misconduct would justify any wife's action *en séparation de corps*, and the husband would be without plea. This was established by jurisprudence in old France, and is settled positively by an article of the Code in modern France, see 4 Demolombe, p. 116, 470-1-7, &c. Under all the circumstances of this case, and under the authorities of law, the Defendant's Peremptory Exceptions must be dismissed and an expertise ordered as prayed for by the conclusions of the Declaration. (5 *J.*, p. 257.)

SICOTTE et CHAGNON Avocats du Demandeur.

P. R. LAFRENAYE, Avocat du Défendeur.

RESPONSABILITE.—ENTREPRENEUR.

SUPERIOR COURT, Montreal, 12th and 13th April, 1861.

Before Mr. J. MONK and a SPECIAL JURY, and 28th June, 1861.

Coram BADGLEY, J., in Banco.

HOLMES *vs.* MCNEVIN.

Held : 1st. That a contractor for the erection of a building is liable to a person passing through a public street for damages for injuries sustained by the falling upon him of a beam from such building.

2nd. That the *onus probandi* is upon the contractor, to show that such injuries were not caused by negligence.

3rd. That the builder is liable for the acts of his workmen and other persons under his control in and about the building. (1)

This was an action of damages brought by Plaintiff, against Defendant, a builder, who was the contractor with the Board of Arts and Manufactures for Lower Canada, in the construction of the Exhibition Building in the city of Montreal. for injuries sustained by Plaintiff by a beam which fell from the building, and broke his arm, and otherwise seriously injured him. Defendant denied that he or his servants, workmen, or members of his family, and persons under his control had acted carelessly or negligently, and affirmed that the injuries Plaintiff had suffered were the result of a pure accident which Defendant had no power of foreseeing or preventing, and for which he was not responsible. The jury found that the damage was caused by the negligence of persons in Defendant's employ, and rendered a verdict for Plaintiff, assessing the damages at six hundred dollars. On the 23rd of April, 1861, Plaintiff was heard upon his motion that Judgment be entered upon the verdict, and Defendant, upon motion, that the verdict be set aside and disregarded, and Plaintiff's action dismissed with costs, or otherwise that a new trial be granted.

BADGLEY, J : Rendering judgment upon the motions said : This case comes up on Plaintiff's motion, for judgment on the verdict in his favor, and on Defendant's motion, on grounds stated for a new trial. This action is in damages, for bodily injuries alleged to have been caused, on the 6th of June last, by the carelessness and negligence of Defendant and his workmen, and by members of his familly and others under his charge and control, and for whom he was responsible, during his construction of the Exhibition Building, in this city, which fronted on a public street, and was in progress of erection under his contract. It is also alleged that, as Plaintiff was passing along that street, he was, without caution to him, and

(1) V. arts. 1053 et 1054 C. C.

without negligence on his part, struck down by a beam of wood propelled with great violence and velocity from the building, whereby he received severe bodily injuries and contusions, and had his arm fractured, suffered great loss and damages therefrom, and was subjected to the expense of £225 for medical attendance; that Plaintiff had taken no sufficent precaution to warn passengers along the street from danger, or to protect them from the fall of materials or otherwise, during the construction of the building, wherefore damages £1000. Defendant denied the negligence and want of care imputed, averred that the injuries were received by Plaintiff's own negligence and want of care, that they were the result of pure accident which could neither be foreseen nor prevented, and for which he was not responsible, that he had taken every possible precaution for the protection of passengers along or in the street, had a right to use a third of it for his building purposes, that Plaintiff at the time was within this limited space, and sitting on a log of wood there, that the injuries were caused by the negligence of a person not in Defendant's employ, and not having any business in the building, who was running over the flooring beams of the third story, and stepping on one lying on its side, but not fastened or adjusted or in position, though sufficiently strong, if it had been properly placed, it broke in two, and one piece was thrown into the limited space in the street, and there struck Plaintiff whilst sitting on the log, causing the injuries complained of. Defendant, in addition, denied his responsibility for the carelessness of the person who caused the accident, Plaintiffs' alleged losses and outlay, and prays for the dismissal of the action. Plaintiff, in reply, asserts that the person who caused the injury was Defendant's own son, who, at the time, was in the building, with his father's knowledge and permission, and, hence his responsibility for his son's acts. These allegations in the pleadings of the parties are stated to show their application to the issues settled by the questions of fact submitted to the jury: 1st. Was Defendant, on the day stated, the contractor of the building in question? 2nd. Was Plaintiff injured by a beam which fell from the building, when passing through or standing in the street? 3d. Was the fall of the beam occasioned by the carelessness or negligence of Defendant, or of any of his workmen or servants, or any member of his family, or of any person under his control, or was it the result of a pure accident? 4th. Did Plaintiff suffer damage from the injury, and the amount? The principal and really only issue is in the 3rd question of fact, was the injury caused by the negligence and want of care imputed to Defendant and the others under his control, or for whom he was responsible, or was it the result of pure acci-

dent ? To prevent misconception, as to the terms pure accident, it may be observed that they are intented to be synonymous with an accident that cannot be foreseen or prevented, and are so used in the expression set out in the plea. Under our system of questions of fact submitted to a jury, the verdict becomes a special one, in which the jury find special facts in issue, in conformity with the statute which provides that "the jury shall, in every case, be required to return a special verdict, in relation to the facts judicially defined," that is the questions of fact submittted to them. The whole of the proceedings in the case are then made up to form the record, which, by our system of procedure then comes up for final consideration and judgment by the court, in banc, upon the merits, in fact and in law. Thus, on the facts found by the jury, the court must not only ascertain the truth of the finding, but, if satisfied of this, must also draw and establish the legal consequences from the facts so found, and, in this manner, a final adjudication in the cause is obtained, and the requirements of the law accomplished. Any other course would inevitably produce confusion, because the finding could not be questioned or controlled, and the mere declaration of a jury would be final, as matter of fact. Not unfrequently the point to be found is a mixed question of law and fact: if, from the facts found, the court can draw clear conclusions, it is no objection to the verdict that the jury have not drawn such conclusions, and stated them as facts found. In this case, the main issues are mixed questions, Defendant's negligence and his responsibility for others, one the one side, are as much mixed questions, as accident is, and, of course, to enable the court to judge fairly between the parties, to test these issues in a legal manner, the evidence must be adduced. Indeed, under our local system of jury and jurisprudence, juries are mere experts, and their findings are nothing more than mere *rapports d'experts.* Now, the evidence in this cause, both extracted from the pleadings and adduced orally, putting aside, for the present, the deposition of Fitzpatrick, that has been objected to, discloses these facts; that Defendant was the contractor of the building, and erecting same when the injuries were received; that Plaintiff was going along the street, in front of the building, very near to the side-walk, on the opposite side of the street, when his attention being attracted to the building, by seeing a person apparently falling through from the third story, he stopped momentarily, when he was suddenly and violently struck down and injured by a beam of wood ejected with sufficient force from the building to reach him where he stood near the opposite side-walk, that Defendant's son, a lad of 18 years of age, was running over the

joists of the upper story, and, in stepping upon one of them, which was not placed in position, nor adjusted, nor fastened, but, if so, of insufficient strength, which had been left negligently lying upon its side, broke in two, and one of its parts, in its descent, struck some part of the building which caused it to receive a violent direction to the place where Plaintiff was standing, and that the carelessness of Defendant's son, in running over the joists, caused the breaking of the beam, and the consequent injury ; it was his fall that attracted Plaintiff's atention to the builging, and induced him to stop, as he did, that this son was in his father's employ, and kept the time of the men employed on the building, and had often been in and through it. The jury, upon the evidence shown and the judge's charge, found affirmatively upon the question submitted, that Defendant was such contractor, that Plaintiff was injured, that the fall of the beam resulted from accident occasioned by the negligence of persons in Defendant's employ, and that the damages were $600. Defendant has moved, on grounds stated, that action be dismissed, or, if not so, for a new trial. The grounds are very numerous, being, 1. Objections of form. 2. Want of evidence to show that injuries were caused by the act of any person in his employe, or that the person who caused the injuries was within Defendant's responsibility, or that such person was in the building at the time, or was then a workman, servant or employé of Defendant, in fact or by the nature or necessity of his employment, or by Defendant's order or directions. 3. From the admission of alleged illegal evidence, which went to prove the age of Defendant's son, and the admission by the latter of that age. 4. From the alleged illegal admission of the deposition of Alexis Fitzpatrick taken by a commissioner, and not a judge. 5. Misdirection of judge submitting as legal proof certain facts set out by Defendant in his plea. 6. Misdirection of judge in casting responsibility upon defendant for his sons act's or carelessness. And 7. That the injuries, as by the evidence, were the result of pure accident, and which could not have been foreseen or prevented by human skill, care, or foresight. Story, an eminent jurist, has said, " by this term *accident*, is intended, not merely inevitable casuality, or the act of Providence, or what is technically called vis major, or irresistable force, but such unforeseen events, misfortunes, losses. acts or omissions as are not the result of any negligence or misconduct of the party." Now, this case presents none of the features of the first part of the definition, the acts of Providence or vis major, ; is it within the latter part, the unforeseen event, or act, or omission, not the result of any negligence or misconduct of the party ? If the improper position of the beam

that broke, it being left unplaced on its side and unfastened, it having been rolled over by heavy weights, for a considerable period of time before, when in its proper position, and the breaking of it, at once, when in its improper position, it was stepped upon by the light weight of a lad of 18, and last, the carelessness of the boy in doing so, as admitted by the plea, be considered, they would seem to take this case out of the negation of the above definition, and prove clearly negligence and misconduct. The plea itself admits the carelessnes, the proof corroborates the negligence. There is no such thing as absolute or intrinsic negligence, it is always relative to some circumstances of time, place, or person, these circumstances are all in combination here, the unadjusted and defective beam and the carelessness of the lad; some acts are absolutely and intrinsically wrong, when they directly and necessarily do an injury as a blow, this case presents no such feature. Others are only wrong from their consequences, as in this case. A master cannot be liable for a wilful and intrinsically wrong act of the servant, but he may be in other cases where the presumption is that he might have anticipated and guarded against the injuries. These are legal grounds and conclusions common to both English and French law, because they are founded on reason and justice, which are nothing but common sense legally applied to the circumstances of life. The French authorities cited by the learned judge at the trial, evidence the intimate relation and consonance in the two systems of jurisprudence. Moreover, the jury have, by their special verdict upon this point, affirmed that the fall of the beam was caused by the negligence of persons in Defendant's employ. This brings me to the other points in Defendant's motion, the non responsibility of the master, and the admission of illegal evidence. As to the first, the law, for reasons of supposed convenience, more than principle, makes a master liable, in certain cases, for the acts of his servant, and presumes, in all cases against him, casting upon him to negative the presumption. This liability results, not only in cases of the nature of contracts which depend on different considerations but in cases independant of contract, such as negligent conduct or gross negligence in driving in the paths, streets, and other similar cases when damage is thereby done. This is legal responsibility put upon the master, it is his duty to take care that his servants do no damage to others by negligence in their work and compel him to compromise that damage; public interest requires this for the people's benefit. Now, it is in evidence that Plaintiff's workmen negligently left the beam not in position nor fastened down, that the beam must have been defective, and that it was broken and thrown down by the

carelessness of his son. That Defendant's son was his servant, doing his business, by keeping the time of the workmen employed about the building. That at the time of the accident workmen were in the building and working. Mulholland states he was there with others, because they were working extra hours, and Defendant has not disproved this proof, nor the presumption that the son was in the discharge of his duty in looking after Defendant's interests. The special verdict applies to the beam of wood which broke and caused the injury. The question submitted was as follows: " Was the fall of the beam occasioned by the carelessness or negligence of Defendant or any of his workmen or servants, or of any member of his family, or of any person under his control, or was it the result of pure accident? " The answer is " that the accident was caused by the negligence of persons in his employ." Now the generality of the answer must be taken in connection with the entire question, and would apply to the workmen and to the son. The objection, therefore, upon this ground is untenable, and cannot relieve the master and father from his legal responsibility Nor is the objection against the proof of the son's age tenable. The lad was of sufficient age to be employed by his father, and, as his servant, gave the finishing touch to the negligence of the workman in leaving the beam in a position and condition unfit to sustain any weight. As to the objection to the admission of Fitzpatrick's evidence, that evidence is quite immaterial, and refers to the state and condition of matters after the injury was inflicted, the other evidence adduced is fully sufficient to sustain the verdict without this evidence, even if the objections were grounded. Upon this point, however, it is an elementary legal principle, that the courts will not set aside a verdict on account of the admission of evidence which ought not to have been received, provided there be sufficient without it to authorize the finding of the jury, 1 Graham, 248, and where justice has been done. In weighing the evidence in this case, as the court is bound to do, in the adjudication upon the merits, it is plain that this case rests upon the other evidence adduced, and that the exclusion of this deposition would not alter the conclusion of the jury, and which the court confirms. No proof is adduced to establish the negligence of Plaintiff, and, under all the circumstances of law and fact, Defendant's motion must be rejected, and Plaintiff's motion allowed for entering up judgment for him on the verdict. (5 *J.*, p. 271.)

TORRANCE and MORRIS, for Plaintiff.

LAFLAMME, LAFLAMME and DALY, for Defendant.

F. CASSIDY, Counsel for Defendant.

TUTOR.—INVENTORY.—SALE OF IMMOVEABLES—SALE OF BANK SHARES.

PRIVY COUNCIL, 2nd August 1861.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH OF LOWER CANADA.

THE BANK OF MONTREAL Appellant, *and* ELEONORE JANE SIMSON et vir., Respondents.

Présent: The Right Hon. LORD KINGSDOWNE, the Right Hon. SIR EDWARD RYAN and the Master of the Rolls, (the Right Hon. SIR JOHN ROMILLY.)

The general principles respecting the power of a Tutor under the old French law in force in Lower Canada, to alienate by sale, or otherwise the property of his ward investigated and defined.

First, it is the duty of the Tutor to make an inventory of all the property of his ward and to take administrative care in the protection and the management of the estate.

Second, a tutor cannot, without the sanction of a court of Justice, sell any portion of the immoveable property of his ward.

Third, nor any property of the ward which is of a mixed character.

Fourth, the tutor cannot alienate moveable property belonging to his ward, except (1) that portion of it which is unproductive of revenue, and (2) such portion also as being of a perishable nature will either cease to exist, or, from other causes, may become deteriorated in value at the time when the ward shall have attained majority.

Fifth, this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heir-looms, to which an hereditary *pretium affectionis*, is attached. (1)

A tutor, in notoriously insolvent circumstances, sold shares in the Bank of Montreal, the property of his ward. The circumstances of the pecuniary position of the tutor were known to the authorities of the Bank, who had notice also from the sub-tutor of the ward not to permit any transfer of the shares. The Bank, however, allowed the transfers, at the instance of the tutor, and paid the dividends to the transferees. In an action brought against the Bank, by the party entitled (the ward who had attained her majority) to recover the amount of the dividends, *Held*, (affirming the judgment of the Court of Queen's Bench in Lower Canada.)

First, that by the *Ordonnance d'Orléans*, (January, 1560, art. 102,) the Bank shares did not fall within any class of property which a tutor had a power to dispose of without the sanction first obtained of a court of Justice, and that the sales by the tutor were absolutely void.

Secondly, that as the sale of the Bank shares was absolutely void from the time of the sale, it was not necessary to make the transferees of the shares parties to the action.

The question raised by this appeal related to the power of a tutor to alienate shares of the capital stock of the Bank of Montreal, in Lower Canada, a company incorporated by the

(1) V. arts. 297, 351*a* et 351*b* C. C.

Provincial Statute 4th and 5th Vict., ch. 98 (1) belonging to his ward, without the assent of a *Conseil de famille*, or the sanction of a Court of Justice.

The facts of the case were as follows; John Simson, of Montreal, died intestate in the year 1835, possessed of thirty shares in the Bank of Montreal, each share of the nominal value of £50, currency. Respondent, Eleonore Jane Simson, was a posthumous child of the intestate; and, as she was the the only child, was entitled to all the property which he left, including the Bank shares. In 1843, Margaret Eleonore, the widow of John Simson, and mother of Eleonore Jane Simson, married Charles Michel De Lisle; and, on the 27th of October, 1843, De Lisle and his wife were appointed conjointly, tutor and tutrix of Respondent. Respondent's mother died in November, 1844; and, on the 6th of December following, Robert Simson, Respondent's uncle, was appointed her sub-tutor. On the 27th of May, 1846, De Lisle was appointed tutor of Respondent. De Lisle being notoriously in embarrassed circumstances. Respondents' sub-tutor, on the 29th of September 1846, caused a formal notification to be given to the Bank, that De Lisle had no power or authority to sell or dispose of any of the Bank shares belonging to Respondent and enjoined the Bank authorities not to allow the transfer or withdrawal of any part of the shares, or to permit any act by De Lisle, or any other person, by which the wards's interests in them might be prejudiced. On the 4th of Deccember, 1848, De Lisle sold six of the shares. This sale, notwithstanding the notice by the sub-tutor, was acknowledged and acted on by the Bank. In January, 1849, he sold two more, and in June, 1849, the remaining twenty-two of the Bank shares. The Bank duly registered the transfers of the shares comprised in these sales. In 1855, Respondent, Simson, married the co-Respondent Turner. By the marriage contract it was stipulated that there should be no community of property between them. In the month of September, 1857, Respondent, being then of age, and described in the declaration as sole and separate from her husband as to property by virtue of the marriage contract, and her husband, the co-Respondent Turner, who was made a party to the suit for the purpose of authorizing his wife to sue

(1) Section 20th enacts. "That the shares of the capital stock of the said corporation shall be held and adjudged to be personal estate, and be transmissible accordingly, and shall be assignable and transferable at the bank according to the form annexed to the act, but no assignment or transfer shall be valid and effectual unless it be made and registered in a book or books to be kept by the directors for that purpose, nor until the person or persons making the same shall previously discharge all debts actually by him, her, or them to the corporation which may exceed in amount the remaining stock (if any) belonging to such person or persons."

brought an action in the Superior Court, for Lower Canada, against the Bank of Montreal, to recover the amount of the dividends on the thirty shares. The declaration, after setting forth the title of Respondent, Simson, stated that the Bank had paid dividends to its shareholders at the rate of 6 per cent. per annum from the 7th of March, 1855, to the 7th of March, 1856, and at 8 per cent. from the 7th of March, 1856, to the 7th of March, 1857; which dividends, on the thirty shares in question, amounted to £2,040, and by the declaration they claimed that sum from the Bank. To this declaration the Bank pleaded, first a peremptory exception; and secondly a "*défense au fonds en faits*," or general traverse. By the peremptory exception the Bank alleged, in substance, that the several transfers of shares made by DeLisle, were valid and effectual, and had divested Respondent Simson of all interest in them; and that, inasmuch as the dividends which had accrued due on such of the thirty shares as, from time to time, remained untransferred, had been accounted for to the tutor or tutors for the time being of Respondent, Simson, she was not entitled to claim any thing further from the Bank in respect of them. To this peremptory exception, Respondents put in two special answers, by each of which they insisted, that the alleged transfers of the shares by DeLisle were fraudulent, illegal, null and void, and ought to be so declared by the court. That the Bank stock was a sure and profitable investment; that it could not be considered as a claim or moveable (*créance ou meuble,*) which a tutor was was required or authorized by law to collect, sell, or realize, in order to invest the proceeds thereof for the benefit of the ward; that the right to the stock was not a *créance,* or moveable, but was an investment in the nature of a *reute constituée* or consolidated fund, the sale or disposal of which was beyond the authority of a tutor, and that from the nature and circumstances of the property transferred, the tutor had no authority, right or capacity to alienate it, and could not effectually do so without an authorization from a judge of the Court of Queen's Bench, or of the Circuit Court, and the consent of the infant's relatives and friends. By the second special answer Respondents further alleged that De Lisle was, and had been for a long time before the date of the transfers in an open state of insolvency, to the knowledge of the authorities of the Bank, which circumstances ought to have prevented the Bank from registering any transfer of his ward's shares made on his sole authority, and without security for the due investment of the proceeds; and that they had in fact been formally warned not to do so, by a notarial notice by the infant's sub-tutor. The answer also set forth that an action

had been brought against De Lisle, after the expiration of his tutorship by Respondent Simson, to have the account of the tutorship taken, which action resulted in a judgment against him for £5,687, 8s. 8d. currency, besides interest, which judgment remained unsatisfied by reason of De Lisle's total insolvency. On the issues thus joined, evidence was given by both parties. On the part of Respondents, it was proved that, during the year 1846, and the three succeeding years, De Lisle was notoriously insolvent; and that at various times during those years promissory notes of De Lisle, held by the Bank, were formally protested for non payment. This evidence the Bank met by evidence that the notes so protested were not their own property, but had been sent into the Bank for collection, on account of the holders or owners thereof. The case was fully argued before the Superior Court of Montreal, and on the 30th of November, 1859, the presiding judge the Hon. Assistant-Justice BERTHELOT, pronounced judgment, condemning the Bank to pay the Respondents the sum of £852 the amount of the dividends payable upon the shares since the dates of the sales by De Lisle, until the 1st of June, 1857. The judgment of the court proceeded on the grounds; first, that the power over the goods of a minor extended only to administration, and that a tutor could not sell, dispose of or otherwise alienate "*les immeubles réels ou fictifs ou réputés tels, ou choses précieuses,*" belonging to a minor, without a special authority; secondly, that the Bank shares sold by De Lisle were "*réputées immeubles fictifs, ou choses précieuses,*" and that the sale of them was without valid authority; and thirdly, that the transfer of the shares by De Lisle was a nullity, and the Bank liable to Respondents for all subsequent dividends.

In rendering judgment, the honorable judge made the following remarks: "Les questions soulevées par cette action et la contestation en icelle sont: 1° Si un tuteur peut vendre et transporter, sans autorité judiciaire ou formalité aucune, des parts de banque, ou autres capitaux de même nature, produisant un revenu au mineur et faisant partie des biens de ce dernier. 2° Tel transport est-il d'une nullité absolue; de telle sorte que le mineur n'a jamais cessé d'en être propriétaire, et peut-il en réclamer les dividendes accrus depuis les actes de transport et d'aliénation, et ce sans y avoir aucun égard. S'il s'agissait de l'aliénation d'un immeuble réel ou fictif, comme d'une rente constituée, faite sans autorité judiciaire du tuteur, la vente en serait d'une nullité absolue; et le mineur devenu majeur pourrait exercer l'action en revendication de plein droit, sans avoir à demander la rescision de la vente faite par son tuteur, et ce, tant d'après le droit romain et par notre ancien droit français, que sous l'empire du nouveau code. Doit-il en être de même

de parts de banque, que l'on assimile à des meubles précieux ou à des capitaux aliénés et placés ponr produire un revenu, comme dans le cas de capitaux de rentes constituées. Sur ces deux questions, l'on peut citer les autorités suivantes, tirées du droit romain, de *notre* droit français et du nouveau code, dont les citations faites ici corroborent comme raison écrite, les dispositions de notre ancien droit. De Bréard de Neuville, Pandectes de Justinien, vol. 10, art. 1. : *Quels biens des mineurs il est défendu de vendre, et quelles aliénations en sont défendues*, n° 4, p. 237. Par une constitution de Constantin, il est également défendu de vendre les maisons de ville, les esclaves et les *meubles précieux*, dont la vente était non seulement permise, mais encore ordonnée par le droit des Pandectes, et cette constitution ne permettait de vendre que les animaux inutiles et les objets qui ne pouvaient pas être gardés sans péril. No 5 : Toutes les aliénations sont prohibées à quelque titre qu'elles soient faites. Art. 4, n° 25, p. 257 : L'effet de cette défense est que l'aliénation étant nulle, le pupille a le droit de revendiquer la chose aliénée et ses fruits. *Dictionnaire du digeste*, Thevenot Dessaules, vol. 2. vbo. *mineurs*, p. 37, n° 13 : Constantin défendit de plus la vente des maisons d'habitation et *des meubles de prix*. Il ne permit de vendre que ceux qui n'etaient pas de garde et les animaux inutiles. P. 500, n° 22 : Dans le nouveau droit, dit l'auteur, suivant la loi, 22, au code, il est défendu d'aliéner les maisons d'habitation et même *les meubles de prix*. Notre droit sur cette matière est réglé par l'article 102 de l'ordonnance d'Orléans, du mois de janvier 1560. En voici les termes : " Les tuteurs et curateurs des mineurs seront tenus " sitôt qu'ils auront fait inventaire de biens appartenant à " leurs pupiles, faire *vendre par autorité de justice les meubles* " *d'une nature périssable*, et employer en rentes ou héritages, " par avis de parents et amis, les deniers qui en proviendront " avec ceux qu'ils auront trouvé comptant, à peine de payer " en leurs propres noms le profit des dits deniers." Meslé, *Traité des minorités*, tit. 1er, ch. 8, p. 134. Il rapporte la constitution de Constantin du 15 mars, an 326, qui ôta aux tuteurs et curateurs le pouvoir de vendre tous meubles ou choses précieuses, et ne leur permet de vendre que les habits qui ne pouvaient se garder et les bestiaux superflus ; et il cite des arrêtés du président de Lamoignon sur l'article 102, portant que les tuteurs et curateurs doivent procéder par *autorité de justice* à la vente des meubles *périssables*, et prendre l'avis des parents pour les autres. P. 138 : Tuteur peut tout pour l'avantage du mineur, mais rien à son désavantage. P. 209 : Le tuteur n'est qu'administrateur des biens du mineur pour en conserver les fonds, et en faire valoir les revenus au profit du mineur. Le tuteur qui vend sans cause *vérifiée* est sans

pouvoir de vendre, comme serait un procureur qui vendrait sans pouvoir de vendre. Tom. 2, p. 35 : La *restitution* n'est pas nécessaire quand le tuteur excède son *pouvoir*, et, en ce cas, il n'y a pas lieu de prendre des lettres de rescision. P. 297 : vente d'un office (immeuble fictif) déclarée nulle le 6 septembre 1761, faute des formalités prescrites pour la vente des immeubles. " Il en serait de même d'une chose purement mobilière, " mais d'une grande valeur, et qui formerait, pour ainsi dire, " toute ou la majeure partie de la succession." A plus forte raison doit-il en être ainsi dans la présente cause, où il s'agit de parts de banque qui, en outre de dividendes réguliers de trois et quatre par cent, ont aussi rapporté des *bonus* que ce tuteur a reçus, en sus des capitaux. Brillon, 4 vol. p. 365, vbo. *Meubles ; mineurs :* " Il est des meubles si précieux, qu'on en " assujétit la vente à certaines formalités, tels que diamants, " pierreries." Loisel, lec. 2, t. 1er art. 2 : " Il tient pour immeubles " les bagues et joyaux, reliques et livres des maisons des " princes." Bourjon, *Des personnes*, tit. 6, ch. 2, sec. 3, p. 56, n° 80 : " La vente des meubles du mineur doit être publique " et non clandestine ; toute autre ne remplirait pas le vœu de " la loi." nos 83-84," tuteur ne doit pas faire vendre les bestiaux " et choses utiles à l'exploitation des terres, ce serait contraire " aux intérêts du mineur. C'est toujours cet intérêt qui doit " guider." n° 85," à l'égard des promesses, cédules et obligations " le tuteur ne doit ni les vendre, ni les *céder*, mais il doit en " faire le recouvrement." Le Prestre, *Questions de droit*, 1re centurie, p. 144, ch. 52. Il rapporte que c'était une maxime vulgaire en droit que la *destination* faisait qu'une somme de deniers était estimée immeuble, et que la *Coutume de Paris*, en cas semblable, l'avait ainsi ordonné par son article 94, conformément à l'article 102 de l'ordonnance de 1560. C. P. art. 94 : rentes constituées à prix d'argent sont réputées immeubles jusqu'à ce qu'elles soient rachetées. Si rachetées durant minorité, deniers du rachat sont censés de même nature et qualité d'immeubles. Le Prestre, 3eme centurie, ch. 34 : " Mineur *res-* " *tituable* dans le cas de vente de son immeuble sans autorité " de justice, *non solum ex capite læsionis sed etiam capite minoris*. Solon, *Des Nullités*, Vol. Ier, Nos 75, 76, 77 : Il rapporte un arrêt du 12 Avril, 1694, suivi d'un jugement confirmatif en appel, qui a maintenu dans toute sa rigueur la *nullité absolue* de la vente d'un immeuble *faite par un* tuteur sans autorité judiciaire ; et il ajoute : cette décision est remarquable, en ce qu'il semble que toutes les circonstances les plus favorables étaient réunies en faveur de l'acquéreur. Le mineur, au contraire, se présentait sous le point de vue le plus défavorable, sa mère avait vendu pour lui conserver sa fortune, pour payer ses dettes, pour obtenir des remises, il n'avait éprouvé

aucune lésion, et cependant il venait se plaindre. Certes, dit-il, la cause n'était pas douteuse s'il se fut agi d'expliquer la maxime "*minor non restituitur tanquam minor sed tanquam læsus*; mais comme la vente avait été faite sans les formalités requises, la vente était nulle de plein droit. Domat, Liv. 4, T. 6, S. 2, No 24, des *Rescisions*, Sur la nullité absolue et de plein droit: "Les lois n'ont pas seulement pourvu à la resti-" tution, mais elles ont de plus défendu l'aliénation des im-" meubles des mineurs, et quand il ne se trouverait pas de " lésion, le mineur serait relevé, par la seule raison de ravoir " des biens qu'il est plus utile de conserver que d'en avoir le " prix." Prevost de la Jannès, Tutelle, p. 336: "Les devoirs " des tuteurs, pour les biens de leurs mineurs, consistent à rem-" plir l'idée d'une sage et vigilante administration. Quelqu'éten-" due qu'aient toutes les parties de l'administration, on peut " les réduire à quatre points, contracter et percevoir les fruits " des fonds, entretenir les biens, faire les poursuites nécessaires " pour la conservation des biens." P. 340: "Si le tuteur doit " vendre les meubles de son mineur; il n'en peut aliéner les " immeubles: cela passe l'administration; il faut excepter les " aliénations *nécessaires* comme *remboursement* de rente cons-" tituée parce que c'est une aliénation *forcée*; et cette quit-" tance est un pur acte d'administration, le débiteur est donc " libéré encore que le tuteur ait dissipé cette somme et soit " devenu insolvable. D'où l'on peut conclure qu'il en serait " *autrement* s'il *cédait* au lieu de recevoir. C'est ainsi en pays " coutumier." Pour faire voir davantage, combien l'autorité du tuteur sur les rentes constituées du mineur est limitée, je réfère au 6e Vol. de Cochin, à son Plaidoyer 147. Il y traite la question de savoir si les rentes constituées appartenant aux mineurs sont valablement remboursées entre les mains du tuteur, sans avis de parents et sans sentence de juge. Dans le cas qu'il rapporte, le père des Sœurs de Beaujeu était spécialement autorisé par l'avis de parents à recevoir toutes les sommes de deniers à eux appartenant; il avait reçu un capital de rente constituée et les mineurs devenus majeurs poursuivaient les débiteurs de la rente sans tenir compte du remboursement à leur tuteur et de l'autorisation générale qui lui avait été donnée par sa nomination. Le débiteur fut déchargé de la poursuite, parce que, comme dit Cochin, p. 47, dans le cas de remboursement de rente, ce n'est pas *disposer* d'un immeuble, mais c'est *souffrir* une disposition qu'on ne peut empêcher, et subir une loi nécessaire. L'on trouve aussi au 1er Volume des *Arrêts* d'Augeard, p. 57, le cas d'une tutrice créancière de ses enfants qui avait disposé, de sa seule autorité, d'effets mobiliers et animaux à eux appartenant. L'aliénation fut maintenue, mais il y est dit, ce qui n'a cependant lieu, que quand le tuteur s'est chargé

dans son compte, des meubles du mineur avec le quart en sus, et que, par le reliquat, il se trouve son créancier. C'est tout le contraire dans cette cause; il n'y avait pas de compte à régler avec le mineur, et Delisle, loin d'être son créancier, est reliquataire par le compte de tutelle d'à peu près cinq mille louis. Pothier, Vol. 6, *Des personnes*, Tit. 6, S. 2, p. 515. La Défenderesse s'est beaucoup appuyé sur ce que Pothier dit ici que le pouvoir du tuteur sur les biens du mineur, quant à leur administration, a la même efficacité que si tous ces biens lui appartenaient. De là la maxime' "*tutor Domini loco habetur.*" Le fait du tuteur est le fait du mineur. Mais ce passage de Pothier doit s'interprêter par et avec ce qu'il dit à la page 616. Cette règle a lieu pourvu que les contrats n'excèdent pas les bornes d'une simple administration. Un mineur n'a besoin de lettres de rescision contre le fait du tuteur, que pour les actes et choses renfermées dans le pouvoir d'un tuteur; c'est-à-dire, qui concerne l'administration du tuteur: et le tuteur dans les choses qui excèdent son pouvoir, doit être regardé sans caractère. Le tuteur peut néanmoins recevoir le *rachat* des rentes rachetables, quoique par là, il aliène la rente due à son mineur qui est immeuble; car le rachat étant forcé, et contenant une aliénation *nécessaire*, appartient à l'administration du tuteur. Mais certes, l'on ne dira pas que le tuteur Delisle a été forcé et obligé de vendre et transporter les parts de Banque de la Demanderesse sa mineure. Ça été au contraire un acte en dehors de son administration. Il n'y avait pas de rachat exercé par un débiteur. C'était le cas d'un tuteur insolvable et en déconfiture qui dissipait la fortune de sa pupille. Poullain Duparc, Vol. 1, L. 1er, ch. 13, Nos 77 et 78, pp. 263 et 264: "Le tuteur ne doit pas vendre les meubles nécessaires pour "l'exploitation des terres, lorsque l'avis des parents est au con-"traire. Il ne peut y avoir de difficulté à l'égard des crédits qui "ne sont susceptibles ni de prisage ni de vente Il en est de "même des actions sur la compagnie des Indes, parce qu'elles "ont une valeur certaine suivant la cour de la place. Mais "nous avons un autre motif de décider en Bretagne. Ces ac-"tions ont un revenu fixe, et elles ne doivent point être ven-"dues, sans un avis exprès de parents. Elles ne doivent même "en ce cas être vendues qu'à Paris sur la place, afin qu'on "puisse en retirer le prix le plus avantageux." Pour la même raison on doit dire que les parts de Banque d'un mineur ne devraient être vendues que sur avis de parents, et à la bourse ou *merchants-exchange*, où le cours et la valeur en sont connus des marchands et capitalistes, de manière à en avoir le plus haut prix, et non pas en faire des ventes clandestines, ou de particulier à particulier, comme M. Delisle l'a fait. *Coquille*, Vol. 2, p. 336, sur l'article 102 de

l'ordonnance de 1560 : " Il dit que cet article ne commande " pas en général de vendre toutes sortes de meubles, mais seu- " lement les meubles *périssables*, qui sont de deux espèces ; " ceux qui consistent en grains, vins, etc., et meubles de mé- " nage commun, etc., etc., etc. Mais si ce sont des meubles pré- " cieux, comme tapisseries, bagues, pierreries, orfèvrerie excel- " lente, et que le pupille ne fût pas endetté, je crois, dit-il, que " le tuteur ne doit pas les vendre, parce que tels meubles sont " comme héritage en une maison." La Défenderesse a soutenu que ces parts de Banque étant déclarées meubles par la section 20e du statut provincial 4 et 5 V. ch. 98, le tuteur avait pu les vendre et les transporter sans aucune autorisation ou formalité. Cette clause du statut ne peut faire perdre à ces actions de Banque leur caractère de choses précieuses, de capitaux produisant un revenu, et dès lors le tuteur n'avait aucun caractère pour en disposer sans autorisation judiciaire et en suivant les formalités légales et usitées. En France, aujourd'hui, sous l'empire du Code, les pouvoirs du tuteur sont réglées comme suit par l'article No. 452 : " Dans le mois qui " suivra la clôture de l'inventaire, le tuteur fera vendre, en " présence du subrogé-tuteur, *aux enchères* reçues par un offi- " cier public, et après les affiches ou publications dont le pro- " cès-verbal fera mention, tous les meubles autres que ceux " que le conseil de famille l'aurait autorisé à conserver en na- " ture." Quoique cet article ne parle que de meubles, il a néanmoins été interprété comme s'appliquant aux meubles incorporels, aux rentes et aux actions de Banque, qui n'ont jamais été classés au nombre de choses périssables, ainsi qu'on va le voir par les citations suivantes : Delvincourt, vol. 1er. p. 124 : " Le tuteur ne peut, sans l'autorité du conseil de famille, " transférer les inscriptions ou promesses d'inscriptions de la " dette publique excédant 50 francs suivant la loi du 24 mars " 1806. Il faut que le cours de la place, au jour de la vente " soit constaté. (Il en était ainsi sous l'ancien droit selon ce " qui est ci-dessus cité de Poullain Duparc pour la vente des " actions de la compagnie des Indes.) Par décret du 25 sep- " tembre 1813, les dispositions de cette loi ont été étendues " au cas où le mineur serait propriétaire d'actions de la Banque " de France. Aux notes, p, 298 : A l'égard des *rentes ordi-* " *naires*, si le remboursement est offert par le débiteur, le tu- " teur a qualité pour le recevoir seul ; mais s'il s'agit d'une " *cession*, je pense que le tuteur ne peut *céder seul* que celles " de 50 francs de revenu et au-dessous. Pour celles au-dessus " il doit être autorisé par le conseil de famille, et la vente doit " s'en faire avec *affiches et publications*." Merlin, *Inscription sur le Grand Livre*, § 3 : " Tuteurs peuvent faire le transport " de ces inscriptions lorsqu'elles sont au-dessous de 50 francs.

"Au-dessus de 50 il faut autorisation du conseil de famille." C'est ce qui a remplacé l'autorisation judiciaire de l'ancien droit, pour les affiches et publications elles étaient requises par l'un et l'autre. Duranton, vol. 3, No. 543 : "Le tuteur," dit-il, "doit faire vendre les meubles," mais en note il ajoute : "ceci "ne s'entend pas des meubles incorporels tels que les rentes, "les créances exigibles ou à terme." No. 598 : "Si le tuteur s'est "en tout point conformé aux dispositions de la loi, ce qu'il a "fait est censé fait par le mineur lui-même en majorité ; et "celui-ci ne peut les méconnaître sous prétexte de minorité "ou de lésion. Mais, au contraire, s'il n'a pas observé les for-"malités qui lui étaient prescrites, c'est un *mandataire* qui a "excédé les bornes de son pouvoir, c'est un individu qui a agi "sans mandat relativement aux actes irréguliers, en un mot, "c'est un étranger. *Nam tutor in re pupilli domini loco ha-"betur, cum tutelam administrat, non cum pupillum spoliat ;* "d'où il faut nécessairement conclure que le mineur n'est "point obligé, que les actes ne sont pas seulement res-"cindables pour cause de lésion, mais qu'ils sont nuls, "*de toute nullité.*" Il résulte des autorités ci-dessus qu'il n'est pas même vrai de dire que le tuteur a le droit de vendre indistinctement tous les biens-meubles de son mineur sans autorité de justice ou sans formalités préalables, publications et affiches ; la pratique, au contraire, a toujours été suivie dans le pays, et les ventes de meubles de mineurs ont toujours été faite d'une manière publique et après certaines formalités et publications reconnues et accomplies. Ne doit-il pas en être de même, d'après les mêmes autorités et avec beaucoup plus de raison, pour la vente de parts de banque ou autres capitaux qui ont été placés avec destination spéciale, pour faire un placement qui devait produire des revenus au mineur et lui en produirait de fait semi-annuellement ; je n'ai aucun doute qu'il en est ainsi, et je regarde d'ailleurs des parts ou actions de Banque comme ayant le caractère d'immeubles fictifs ou meubles incorporels tout aussi bien que des capitaux de rentes constituées, et même plus en un sens, parce que le capital d'une rente constituée peut être remboursé au créancier de la rente par un débiteur désireux de se racheter, tandis que la Banque ne peut remettre et payer le capital des actions à ses actionnaires ; elle est obligée de le garder, et le capital en est en quelque sorte aliéné tant qu'il n'y a pas dissolution d'association. L'on ne peut douter que la législation française, si jalouse de protéger et sauvegarder les fortunes des mineurs, dans ses meubles et choses précieuses, ne peut l'avoir été moins pour lui conserver des capitaux de rentes, ou autres comme parts et actions de Banque, comme étant des immeubles fictifs ou meubles incorporels, qui ont une valeur aussi certaine que des capitaux de rente constituée,

et sont un moyen ordinaire et journalier de placer et réaliser sa fortune. L'on pourrait même dire sous ce rapport qu'elles ont remplacé presque complètement les créances et capitaux de rentes constituées, qui sont aujourd'hui des placements de très rare occurrence, et nullement en rapport avec l'état de choses existant et les développements du commerce et de l'industrie. C'était l'esprit de cette législation tout aussi bien que celui du nouveau code de protéger tous les biens quelconques des mineurs, qu'ils fussent immeubles ou meubles précieux, corporels ou incorporels. Les lois, il est vrai, ont donné tout pouvoir au tuteur pour administrer les biens de son mineur, mais d'un autre côté elles ont entouré de formalités nécessaires à observer, tous les actes qui de leur nature sont aliénatifs des biens du mineur, lesquels ne peuvent être aliénés que dans les cas de nécessité et sur autorisation ; hors de là, l'aliénation est radicalement nulle, et le mineur doit être restitué de plein droit ; il n'est pas réputé avoir cessé d'être propriétaire des choses et biens aliénés, et il y rentre non pas *tanquam læsus*, mais *tanquam minor ; non solum ex capite læsionis sed etiam capite minoris.* Dans le cas actuel, la vente de £1500 des actions de banque de la demanderesse mineure, faite par son tuteur non autorisé, dans un court espace de temps, du 6 de janvier au 28 de septembre, 1849, alors qu'il était *notoirement* insolvable et en déconfiture, et sous protêt pour un grand nombre de billets au bureau même de la défenderesse, et nonobstant la protestation du subrogé-tuteur, Robert Simson, en date du 29 septembre, 1846, à l'effet de lui notifier que le tuteur n'avait pas autorité pour aliéner ces capitaux, et que, d'ailleurs, la mineure avait des revenus suffisants pour se maintenir, était une violation de la loi et de ses devoirs comme tuteur, et une dilapidation de la fortune de la mineure, que l'on pourrait presqu'imputer à la défenderesse, qui n'avait pas voulu tenir compte de ce qu'elle savait et de ce dont elle était avertie. Qui pourrait en effet sérieusement prétendre que c'était là un acte de sage administration ou même simplement d'administration de la part du tuteur ; c'était bien au contraire le détournement et la spoliation des biens de la mineure par un tuteur avide et en déconfiture, et c'est le cas d'opposer à la maxime invoquée par la défense " *tutor domini loco habetur,*" cette autre maxime, " *nam tutor in re pupilli domini habetur cum tutelam administrat, non cum pupillum spoliat.*" Si la doctrine soutenue par la défense devait ou pouvait prévaloir, que deviendrait la fortune des mineurs aux mains de leurs tuteurs, qui pourraient convertir à leur plaisir et sans aucune restriction, £5000, £10000 de leurs capitaux, peut-être même toute leur fortune, placée par leurs parents dans des fonds de Banque ou d'autre espèce, tels que débentures du gouvernement et autres, qui peuvent et doivent

être assimilés à une aliénation de fonds pour de longues années, dans la vue de leur assurer des revenus fixes et certains, et les employer, sinon comme dans ce cas-ci à payer leurs dettes, peut-être à les convertir en d'autres fonds de moindre valeur et qui ne produiraient pas des revenus aussi surs, ce qui rendrait entièrement nugatoires, les vues et les intentions de leurs parents dans le placement de leurs capitaux, en devenant actionnaires dans une banque plutôt que dans une autre, en prenant et achetant des bons et débentures du gouvernement plutôt que ceux d'une corporation, etc. Non, il ne peut en être ainsi, il vaut mieux dire et il faut dire que tout capital placé avec le caractère de l'inaliénabilité et de destination spéciale par les parents du mineur, doit rester là où il a été placé, pour produire le revenu qu'il peut et doit produire, tout comme un capital de rente constituée, et que le tuteur ne pourra l'aliéner, transporter ou autrement en disposer, car chacun de ces actes est en dehors de ceux qui ont le caractère de simple administration, et le pouvoir du tuteur, sur les biens de son mineur, ne va pas au-delà. Dans les cas de rachat il remplit un rôle passif et subit une nécessité ; dans les cas de vente, cession et transport, il remplit un rôle actif. C'est ce qu'il n'a pas le droit de faire.

Judgment of the Superior Court : La Cour, considérant que par la loi, le pouvoir du tuteur sur les biens du mineur ne va pas au delà de celui d'une simple administration, et qu'il n'a nullement le droit de vendre, transporter ou autrement aliéner, sans autorisation suffisante ou préalable, les immeubles réels ou fictifs, ou réputés tels, ou choses précieuses appartenant à son mineur : considérant, de plus, que les trente parts ou actions dans les fonds de la Banque de Montréal, mentionnées dans la déclaration et les plaidoyers, dont était propriétaire et en possession, comme actionnaire, feu John Simson, au jour de son décès, sont, par leur nature, des capitaux qui doivent être réputés immeubles fictifs, ou choses précieuses, appartenant à la demanderesse, et que les actes de transport et vente invoqués par la défenderesse en ses plaidoyers, comme en ayant été faits par Charles Michel Delisle, en sa qualité de tuteur de la demanderesse, alors mineure, aux divers personnes y mentionnées, paraissent avoir été faits sans aucune forme d'autorité ou formalités quelconques requises par la loi, et alors que le tuteur était en déconfiture complète, et que, pour ce, ils n'ont pu faire perdre à la demanderesse, Eléonore Jane Simson, le droit qu'elle y avait comme héritière de feu son père, John Simson, tant pour les capitaux qu'elles représentent, que pour les intérêts, revenus ou dividendes qu'elles ont pu produire depuis le décès de John Simson, et qu'ils sont, par conséquent d'une nullité absolue vis-à-vis de la mineure, la

demanderesse, qui n'a jamais cessé, nonobstant les dits transports, d'être propriétaire, et en possession des dites parts de Banque, a renvoyé et débouté et renvoye et déboute les exceptions et défenses de la défenderesse ; et, considérant, en outre, qu'il appert par la procédure, que depuis les dits actes de transports, les dividendes déclarés payables par la défenderesse sur les dites parts se sont élevés à la somme de huit cent cinquante-deux louis, n'ont pas été payés à la demanderesse, ni à son tuteur, et que la défenderesse en est encore débitrice vis-à-vis la demanderesse, a condamné et condamne la défenderesse à payer à la demanderesse la somme de huit cent cinquante-deux louis, pour tous les dividendes devenus payables à la demanderesse sur les dites parts de Banque, depuis la prétendue aliénation d'icelles en vertu des dits actes de transports et vente, jusqu'au premier Juin mil huit cent cinquante-sept ; avec intérêt du 17 Octobre, mil huit cent cinquante-sept, jour de la signification.

Against this judgment the Bank of Montreal appealed to the Court of Queen's Bench for Lower Canada. The case of the Bank, Appellants, before that Court was, that the thirty shares in question were, as part of the personal estate of respondent Simson, during her minority, wholly in the keeping and under the control of her Tutor, for the time being, and not under the keeping or control of Appellants, who, having no right or authority to inquire into and judge of the necessity of a sale and transfer of the shares, could not legally refuse to allow the tutor to transfer them to third parties; and that if there were any question respecting the tutor's right to make such transfers as he had made, it could only be either between him and his *quondam* Ward, Respondent Simson, or between her and the transferees or purchasers of the shares; and further that, according to Respondent's own allegation in the second special answer, an action had been instituted in the Superior Court at Montreal against De Lisle, Respondent, Simson's, *quondam* tutor, *en reddition de compte* of his management of her property, and, on his rendering such account, she accepted it, and had obtained judgment against him for the *reliquat*, or balance thereof. That, in the absence of proof to the contrary, it must be presumed that De Lisle, in that action, duly accounted to Respondent, Simson, for the proceeds of the sales of the thirty shares, and that her judgment against him covered the amount of such proceeds. The case of Respondents stated in detail the legal grounds insisted on by them, and they relied in support of the judgment appealed from, on the four following propositions: First, that the Tutor, by virtue of the functions which the law reposed in him had no power or authority to sell Bank shares belon-

ging to his Ward; second, that to enable a Tutor to alienate property of his Ward which is invested and productive of interest, he must previously obtain the consent of the parents, and the authorization of a Judge, founded either on the necessity of such alienation or upon the fact of its being for the infant's interest; third, that the Bank's knowledge of the Tutor's insolvency, and the formal prohibition to permit or recognize such transfers which was given to the Bank by the Sub-tutor, made Appellants responsible to Respondents, and gave the latter a right to demand the dividends and profits as if no such transfers had been made; and, lastly, that the transfers of the Bank shares made under such circumstances were absolutely null and void. The appeal was argued before Sir L. H. LAFONTAINE, Chief-Justice; Mr Justice AYLWIN and Mr Justice DUVAL, two of the Puisne Judges of that Court; Mr Justice MONDELET, assistant; and Mr Justice BADGELEY, one of the Judges of the Superior Court of Lower Canada, sitting for Mr Justice MEREDITH (who was absent from the Province); and on the 31st of May, 1860, the Judges who heard the Appeal, delivered their Judgment *seriatim*, which, with the exception of that of Mr Justice AYLWIN, who dissented from the majority of the Court, were in favour of Respondents, and by the final judgment of the Court, the appeal was dismissed, with costs.

Here follow the remarks made by the judges of the Court of Queen's Bench in rendering judgment.

AYLWIN, J., *dissentiente:* The judgment of the court below was given in favor of Respondents, condemning the bank to pay them the sum of £852," *pour tous les dividendes devenus* " *payables à la demanderesse sur les dites parts de banque,* " *depuis la prétendue aliénation d'icelles en vertu des dits* " *actes de transport et vente, jusqu'au 1er juin 1857, avec* " *intérêt du 17 octobre 1857, jour de la signification.*" The *motifs* upon which this judgment is made to rest, are " que, " par la loi, le pouvoir du tuteur sur les biens du mineur ne " va pas au-delà de celui d'une simple administration, et qu'il " n'a nullement le droit de vendre, transporter ou autrement " aliéner, sans autorisation suffisante et préalable, *les immeubles* " *réels ou fictifs ou réputés tels, ou choses précieuses* appar- " tenant à son mineur. Que les trente parts ou actions dans les " fonds de la Banque de Montréal &c., sont, par *leur nature,* " *des capitaux qui doivent être réputés immeubles fictifs, ou* " *choses précieuses, et que les actes de transport et vente invo-* " *qués par la Défenderesse* (the bank) en ses plaidoyers, comme " en ayant été faits par Charles Michel Delisle, en sa qualité " de tuteur de la Demanderesse, alors mineure, aux diverses " personnes y mentionnées, *paraissent avoir été faits sans*

" *aucune forme d'autorité ou formalités quelconques requises* " *par la loi*, et alors que le tuteur était en déconfiture com- " plète, et qu'ils sont par conséquent d'une nullité absolue vis- " à-vis de la mineure, qui n'a jamais cessé, nonobstant les dits " transports, d'être propriétaire et en possession des dites " parts de banque. Que depuis les dits actes de transport, les " dividendes déclarés payables par la défenderesse sur les dites " parts se sont élevés à la somme de £852 cours actuel, savoir, " &c., et qu'ils n'ont pas été payés à la demanderesse ni à son " tuteur, et que la défenderesse en est encore débitrice vis-à- " vis la demanderesse." The proposition laid down by the court are : 1. The stock in question was *immeuble fictif*, (real property by fiction of law) or *chose précieuse ;* 2. the tutor had no disposing power over it, although he was authorised to receive the dividends; 3. the transfer of the shares made by the tutor was a mere nullity, and the bank became liable personally to the minor for all the dividends paid subsequently to the purchasers of the stock. From the tenor of the judgment, it is evident that the allegation of fraud, as against the bank, is not sustained, and that the pretention of Respondents to claim all the dividends, from the time of the death of Simson, has been narrowed down to the period between the sale of the shares and the bringing of the suit or writ. The right of the tutor to receive the dividends is recognized in express terms by the judgment," qu'ils n'ont pas été payés à la demanderesse, ni à son tuteur." It is now time to test these three propositions and to ascertain if they support the judgment under revision. To begin with the first, it is disposed of at once by the act of incorporation of the bank, provincial statute of the 4 and 5 Vict., cap. 98, sect. 20, which enacts," that the shares of the capital stock of the corporation, shall be held and adjudged to be personal estate, and be transmissible accordingly ; and shall be assignable and transferable at the bank, according to the form of schedule A, annexed to this act : but no assignment or transfer shall be valid and effectual unless it be made and registered in a book or books to be kept by the directors for that purpose : nor until the person or persons making the same shall previously discharge all debts actually due by him, her, or them, to the corporation which may exceed in amount the remaining stock (if any) belonging to such person or persons ; and no fractional part or parts of a share, or other than a whole share, shall be assignable or transferable ; and when any share or shares of the said capital stock, shall have been sold under a writ of execution, the sheriff by whom the writ shall have been executed shall, within thirty days after the sale, leave with the cashier of the corporation, an attested copy of the writ, with the cer-

tificate of such sheriff indorsed thereon, certifying to whom the sale has been made; and thereupon (but not until after all debts due by the original holder or holders of the shares to the corporation, shall have been discharged as aforesaid,) the president or vice president, or cashier of the corporation, shall execute the transfer of the share or shares so sold to the purchaser, and such transfer, being duly accepted, shall be, to all intents and purposes, as valid and effectual in law, as if it had been executed by the original holder or holders of the said shares, any law or usage to the contrary notwithstanding."

FORM OF SCHEDULE, A.

Referred to in the twentieth section of the foregoing act.

For value received from I, or we of do hereby assign and transfer unto the said shares, on each of which has been paid pounds shillings, currency, amounting to the sum of pounds, shillings, in the capital stock of the bank of Montreal, subject to the rules and regulations or the said bank.

Witness my (or our) (hand or hands) at the said bank, this day of in the year one thousand eight hundred and .

(Signature.)

I, (or we) do hereby accept the foregoing assignment of shares in the stock of the bank of Montreal, assigned to me, (or us) as above mentioned, at the bank, this day of , one thousand eight hundred and .

(Signature.)

It is impossible to draw from the old law of France, as it stood at the conquest of Canada, in 1759, any analogy to afford a rule for the disposal of bank stock, the creature of our modern legislation. But the present french code, and the writers upon it, may very properly be referred to in casu consimili. Reserving the question as to *choses précieuses* under the old law to be discussed under the second proposition, I shall at once proceed to the consideration of that proposition dismissing the first with this single remark, that there can be no *immeuble fictif* when a statute says, in directs terms, that the property in question shall be personal estate, or *meubles*, and transmissible as such. The power of the tutor is stated by Pothier, vol. 6, tit. 6, sect. 4, art. 3, §. 2, *des personnes*, in the following broad terms: " le pouvoir du tuteur sur les biens du mineur est tel que tout ce qu'il fait par rapport à leur administration a la même efficacité que si tous ces biens lui appartenaient. De là cette maxime de droit: tutor domini

loco habetur.' With regard particularly to stocks and shares in commercial companies, the modern french writers have had occasion to treat of the old law before the code, in relation to the disposing power of the tutors, and I shall content myself with a reference to two of them, in testing the second proposition of the court below. Marcadé, *Explication du code Napoléon*, vol. 2, p. 254, n° 263, says: " Quant aux meubles nous avons vu que. pour les meubles *corporels*, il y a pour le tuteur, non pas seulement faculté, mais obligation, de les vendre, à moins que le conseil de famille n'ait ordonné de les conserver en nature, cas auquel disparaîtraient et l'obligation et même la faculté d'aliéner. Pour ce qui est des meubles incorporels, savoir, les rentes sur l'état ou sur des particuliers les créances, les actions dans les compagnies de finance, de commerce ou d'industrie, le Code reste muet, et le tuteur trouve dans sa qualité de représentant du mineur le droit de les aliéner, sans avoir besoin de demander une autorisation qu'aucun texte n'exige." V. 7 Demolobe, nos 597 et 598. The principle of the old law of France was *mobile* vilis *possessio*. It is particularly to be noticed, that this action has been brought to recover, not the amount of stock transferred, but the dividends upon it. Now, it is unquestionable that the tutor has a right to receive the dividends, and his acquittance is a discharge to the Bank and binds his pupil. If he had continued to receive them himself, however, he might have misapplied the proceeds, the minor must have borne the loss. In case of a debt due, whatever may be the amount, the tutor, of his own authority, as *loco domini*, is entitled to receive payment, without an *avis de parents*, or the *Conseil de famille*. Where lies the difference then between the receipt of the dividends by himself in person, or by his clerk, or his appointed agent or attorney ? And is not his assignee his attorney *pro hac vice ?* I concur in the doctrine laid down by Demolombe. n° 598, S'il s'agit en effet d'une créance actuellement échue, le tuteur pourrait la recevoir, et on ne voit pas pourquoi il ne pourrait pas la transporter. The assignment of itself has done no prejudice to the minor, it leaves her where it found her, without changing her condition in anywise ; but, the claim of the Minor to relief invariably is *non tam minor quam læsus*. If the assignment or sale of the stock was collusive or made upon an inadequate consideration, the Minor would have her remedy against the assignee, upon the ground of his fraudulent participation in a contract to her prejudice, but the case as to the Bank is very different. The dividends were all actually paid, to the appointee of the tutor who had an undoubted right to receive the money. Supposing that the bank had refused to pay the appointee, would not the tutor

have had a right to call upon it to pay him ? No loss or *lésion* has been incurred by the minor, in consequence of the mere act of assignment, and she is therefore estopped from making any claim founded upon or by reason of it *(non recevable.)* The judgment treats the stock as realty, or *choses précieuses*, and Loiselle & Coquille have been cited, upon this point. If even bank stock were in express terms *choses précieuses*, at common law, the words of the Act of Incorporation of the bank would make them *meubles*, mere personals, and the case remains the same. But, upon reference to the authorities cited it will be found that they afford no ground for this pretension and that they are wholly inapplicable. Loiselle describes *choses précieuses* as being " les principales bagues et joyaux, reliques et livres, dans les maisons *des Princes et Hauts Barons*," rings, jewels, holy relics and books, in princely houses and high baronials residences. The authority from Coquille is still more unfavourable to the pretensions of Respondent. It explains the edict of Orleans. Art. 102, which, while it expressly enjoined upon the tutor to sell *les choses périssables* perishable articles, left *meubles en général* as they stood at common law, the description given of *meubles précieux* is " qui ne sont en commerce commun, comme tapisserie, " linge excellent, bagues, pierreries, orfèvrerie excellente, et " que la maison des pupilles ne fût affairée ni endebtée et " selon les facultés puisse porter quelque parade ; je crois que " le tuteur ne doit pas les vendre parce que tels meubles sont " comme héritage en une maison." Manifestly, bank stock enters not into this category, but the very reverse of it, it is eminently in *commercio*, its value rising and falling according to the fluctuations of the market, from day to day and as being the most marketable commodity in our state of society. The article of the Edict was never understood in France, as a restraint upon the sale of personals, meubles, but as directory, with reference to *les choses périssables*. But bank stock may depreciate, as well as rise in the market. Would it be in the power of a tutor to summon the *Conseil de famille* to deliberate upon the expediency of selling out stock, at a given crisis, in the money market or in the commercial world ? The bank charter imposes even upon the government absolute secrecy when examining into its affairs under peculiar circumstances expressly stated in the Act of Incorporation. Is it consistent with banking operations to permit stockholders *de plano*, to institute a judicial enquiry, into the affairs of a bank whenever they may think it expedient ? With all the favor due to minors at common law, and the protection which it affords them, it is inconsistent with the very existence of banks, that the state of their affairs should be submitted to

public discussion before a *conseil de famille*, in presence of a judge, and to the publicity of a record of court. The pretensions of Respondent would seem to amount to the imposition upon the bank of the duty of subrogate tutor, to watch over the conduct and intromissions of the tutor to minors. Supposed misconduct is attributed to the bank in this matter, in not checking the proceedings of the tutor. The next of kin and the *Conseil de famille* were the parties who gave to Delisle, the official character, in which he appeared before the *bank*, for it is by their choice and election that he became tutor. Upon the death of his wife, the mother of Respondent, when he ceased to be tutor and the grandmother was elected, Delisle was her chosen representative and as her attorney continued in that capacity to deal with the bank. Upon the death of the grandmother, the paternal uncle took steps to be appointed tutor but the *Conseil de famille* was against him and Delisle was again appointed tutor *contradictoirement* by judicial authority. The pecuniary circumstances of Delisle must have been known to the *Conseil de famille*, but, whether he was solvent or insolvent, so long as he held the appointment of tutor, parties were bound to deal with him in his official character, when acting within the scope of his authority *nomine tutoris*. The protest served by the uncle upon the bank makes no mention of Delisle's insolvency, but is predicated upon the assertion that "*Delisle has not only no power or* "*authority for so doing* (id est disposing of certain shares of "stock), *but cannot show the shadow of a necessity in as* "*much as the income now accruing to the minor from the bank* "*stock and other sources is more than amply sufficient for* "*her education, clothing and maintenance*." It was the duty of the uncle, as sub-tutor, not merely to protest, but to take proceedings to set aside the appointment of Delisle, and also in the nature of an injunction to prohibit any alienation of the stock. The assertion, at the argument, that this had actually been attempted by the uncle, and that the decision of the court was adverse to his pretensions, amounts to nothing, as there is no proof of it, but, on the other hand, as nothing is shown to have been done by the sub-tutor towards obtaining a *destitution de tutelle*, and as a mere protest had no legal effect whatever, inaction on his part would amount to tacit acquiescence. Surely, in such case, it would be impossible to impose upon the bank the necessity of supplying the neglect of the sub-tutor, and of acting for the minor in his default. There is nothing to prove the assertion that her income was "more than sufficient for the education, clothing and maintenance of the minor," at the time of the alienation. The final defalcation, as established against the tutor by the judgment

obtained against him by respondent affords no proof of this. When this defalcation commenced is not ascertained; the shares were not all sold at once, but at different times and to different parties. It was the duty of respondent to shew *lesion* upon the occasion of each alienation, for her claim to relief, or *restitutio in integrum*, depends upon proof of that *lesion*. It is to be noticed that respondent has herself produced this judgment, and, in this case, it is evidence for the bank and against her. Now, it appears that she has formally and expressly accepted the tutor's account, the judgment being predicated upon the "*vu l'acceptation par les demandeurs du* "*compte rendu par le Défendeur le seize mars dernier*" that she has obtained judgment for the *reliquat de compte* or balance of account against her tutor. The judgment "*donne acte aux demandeurs de leur acceptation*," with this acceptance entered *apud acta*, at her own instance, it is difficult to understand, how she can claim against the bank. The judgment appealed from seems to me eminently faulty, in the third proposition which it sustains. The assignments made by the tutor were in the form required by the Act of Incorporation of the bank; they are subsisting instruments standing publicly of record in the bank book. Nothing is more certain under our law than that the cancellation and annulling of such an assignment must be directly sought for in the first instance, and duly pronounced by a court of justice. This could only be done by making the assignees parties to the cause. The shape which this cause has assumed, is such as to ignore the active parties to the assigment and viewing them as waste paper, to hold the bank to a liability, as absolute, as if no transfer had taken place at all. The bank was merely passive in these transactions, yet, their absolute nullity is assumed as granted, without notice to the assignees, the recorded proprietors of the stock. Now as to them respondent was obliged to establish in court, *lesion*, sustained by the act of the tutor, and upon proof of that, adversely to them to solicit and obtain restitution. Until this restitution be awarded, the transfer upon the face of the books of the bank is a complete answer to respondent's demand. If the law were not so positive upon this head, the injustice of disposing of the rights of third parties, de facto in possession of the stock, without notice to them, would be sufficiently obvious. Whatever favor may attach to the cause of the minor, restitution must be expressly awarded, but, in this case, the party has never even asked for restitution, and, yet, in the absence of the necessary "*conclusions*" and aid prayer, judgment has been given in favor of respondent. I am convinced that this judgment is opposed to every principle of the law of Lower Canada, in

relation to the cause, (see Demolombe, vol. 7, No. 812 and sequent), and I would, therefore, be of opinion to reverse it and to dismiss respondent's action; reserving to her, if so advised, her recourse, if any she has, to have the assigments set aside, and to obtain restitution in due course upon proof of *lesion*.

BADGLEY J. The facts must be briefly stated. John Simson had invested £1500 in 30 shares of the stock of the Bank of Montreal, appellant, which, by his decease intestate, on the 7th March, 1835, became the property of female respondent, his posthumous and only child and his sole heiress. The usual formalities were resorted to for the protection of the person and property of the infant by the appointment of a tutor, the last of whom was Charles M. Delisle, mentioned in the pleadings in this cause, and who occasioned the contention between the parties. He was appointed on the 27th of May, 1846 to the exclusion of the paternal uncle who, however, was at the same time made the sub-tutor to the minor. The share dividends were regularly paid by the bank to the several tutors in office as they fell due, until the disposal of the shares by Delisle, until which period the account in the bank books was entered under "the estate of the late John Simson." The shares were disposed of at short intervals, between the 4th of December, 1848, and the 29th September, 1849, during which period, as well as long previous and subsequent thereto, Delisle's insolvency was notorious. His paper was under protest by the bank, as early as July, 1846, within two months of his appointment, and a large number of his notes in the bank were protested by the bank itself during the period of his disposal of the shares. So questionable, indeed, were his circumstances that the sub-tutor, in his natural interest for the welfare of his infant niece, specially notified the bank, by a notarial protest dated 29th September, 1846, "not to allow Delisle to transfer her shares, because he had no power or authority so to do, and because there was no necsessity for it, inasmuch as the income derived from those shares and from other sources of revenue, were more than amply sufficient for the minor's clothing, education and maintenance," an assertion, as to the shares fully justified by the statement of bank dividends and bonuses mentioned in appellant's pleadings. The Bank of Montreal, a Joint Stock Banking Corporation, was governed, at the time, by its Statutory act of Incorporation, 4 and 5 Vic, ch. 98, which, among other provisions incident to the purposes of such a body, declared its shares to be personal estate, assignable and transferable as personal property according to a prescribed form, and further provided "*that no assignment should be valid unless made and registered in a book to be kept by the Directors for that purpose.*" The

fact of the transfers having been made rests solely upon copies of entries in a book called the transfer book, which were certified in 1859, by the present cashier, Mr. Davidson. to be true extracts. The record offers no evidence of any application to the directors by Delisle for the allowance of the transfers, nor of any action by the directors upon the subject, nor does the charter itself authorize their allowance by the cashier or by any other bank officer without the sanction or direction of the directors. The infant, at the period in question, was about 13 years of age. The action was instituted in this state of things, and claims directly from the bank the dividends upon the original 30 shares from the last payment of them to the then tutor in office; this demand was resisted by Appellant by two pleas, a special exception, and a general denegation of facts, the former setting out as special ground the fact of the transfers of the shares by Delisle, as tutor, in the manner stated above, and Respondent ceasing thereby to be the owner of the shares, the latter putting in issue generally the allegations of the declaration. The sole defence to the action, therefore, and the only real point of contention being made by the special exception, if that fail Respondent's claim and right *prima facie* stand good, the allowance of the transfer by the bank being unnoticed. This issue so offered was adopted by respondent's special replication, which alleged the tutors' incapacity to transfer the minor's shares, the absolute nullity of the transfers when made, Appellant's knowledge of Delisle's insolvency at the date of these transactions, and the warning notification to the bank by the sub-tutor, concluding upon all these grounds for the direct liability of Appellant. The facts of record leave no doubt of the bank's scienter of Delisle's insolvency, of the bank's allowance of the transfers, not only with that knowledge, but against the notice given, and finally of the entry and allowance of the transfers without apparent action by or sanction of the directors for the time being to whom the transfer book was specially confided by the charter, and who, as representing the corporation, were specially intrusted with the administration and management of the stock for the shareholders. The negligence of the bank, as matter of fact, is shown by the record, whilst the only justification offered in law, is that the authority of the tutor was sufficient to divest the minor of her property. Now Appellant's pleading involves the tutor's legal capacity to make the transfers, and his rightful power to alienate the property of his minor by his own authority; it also involves an important consideration for Appellant, namely Appellant's presumed knowledge of the law of the land as to the extent of that legal capacity and power, and the importance of that

consideration is manifest in this, that ignorance of the law will not excuse the bank from the legal consequences of their allowance of the illegal and unauthorized acts of the tutor. *Ignorantia juris quod quisque scire tenetur non excusat* or as in the Digest 22, 6, 1. *Regula juris est quidem ignorantiam cuique nocere, facti vero ignorantiam non nocere.* The court and the counsel engaged in the argument of this case have been so abundantly assisted by the labours of the learned judge who decided the cause in the court below, and by the comprehensive and exhaustive list of law authorities collected by him from our local jurisprudence iu support of his judgment, that, with reference to the French law of Lower Canada, I shall content myself with stating general propositions with only occasional references to elucidate or confirm them. Now the general law which regulates the capacity of tutors and their power over the property of their pupils, and which also extends a jealous protection to the latter against the illegal acts of their tutors, is the same as that in France, from which our civil jurisprudence is derived, and is similar to that of England with which we are connected and controlled in the last resort by means of the appellate jurisdiction to the Privy Council. The capacity of the tutor is also specially regulated by the local law of his appointment, which determines the conditions of the office within precise and fixed formalities to be accomplished in certain cases for the validity of his acts and contracts as tutor, in the interest and for the advantage of the minor. The tutor is established for the preservation, not for the alienation of the minor's property, which can neither be effected nor alienated, except for the minor's advantage, and the reason for the alienation must be proved to the satisfaction of and be authorised by the judge. Meslé, *Traité des Tutelles*, p. 110. Their property cannot be alienated from them at all, nor their capitals broken into, without an absolute and stringent necessity, such as for maintenance and education. No such alienation can be effected by the tutor of his own authority; even for such objects of primary necessity, he can only effect this upon the adoption of the formalities of law the assent of a family assembly specially convoked for the expression of their opinion upon the subject, and not even then without the sanction of judicial authority homologating the advice of the assembly. Every book in our law which treats of the subject lays down the general principle, that the property of a minor cannot be alienated without the observance of these formalities and the sanction of judicial authority; the only exception being for *meubles périssables* and moveables of inferior value. In England, courts of Equity will never permit guardians or trustees of their own authority

to break in upon an infant's capital, and it appears that they have never sanctioned such conduct. 1 *Ves. Jun.* 247 ; 5 *Ves.* 473. Whatever might be done under particular circumstances there, as it would be here, it is declared to be impossible to sanction a trustee in breaking in upon the infant's capital, but the courts themselves will do so for the maintenance and education of the infant, where the interest of the capital would be too small for these purposes. 1 Russ & My. 499, 575 ; 1 J. & W. 253 ; 2 Y & C. C. C. 181. A like result is obtained here by means of the formalities and sanction above referred to, which are declared to be essential for the purpose by our jurisprudence. Here, the tutorship is solely dative, the tutor cannot be appointed by will, and he derives his office as such from judicial appointment ; in England, the jurisdiction of the chancellor to appoint guardians to infants where no testamentary guardian has been appointed by the will is undoubted ; there also a like salutary jurisdiction is exercised by Courts of Equity over guardians, as, here, by our courts of law over tutors ; and again, in England every guardianship is a trust, whilst here the *simple administration* confided to the tutor, renders him to all intents and purposes a trustee also both exercising fiduciary powers for the advantage, not for the injury of the infant or minor. The wise policy of both systems of jurisprudence has affixed upon these fiduciary persons, the disqualification of disability for certain of their acts and actions, upon the ground that one intrusted with the interest of others cannot be allowed to make the business of the infant or minor an object of interest to himself, and hence by our law, all unauthorized alienations are null *ipso facto* and *de jure*, "de plein "droit, et tellement que le mineur n'a pas besoin à cet égard "d'être restitué en entier, *et ad extremum notandum, vendi-* "*tionem factam sine decreto et ipso jure nullum esse, ideoque* "*minore non opus est restitutione in integrum.*" De là suit que le pupille devenu adulte peut, dans le même cas, faire rescinder la vente sans prendre des lettres, et c'est ainsi effectivement que la question a été décidée par les auteurs que rapportent Bouvot, Tom. 1r., &c., et Basnage, *Coutume de Normandie*, art. 592. Ferrière, *Des Tutelles*, p. 227. To the same effect is Pothier, *Pandectes Franc.* 10 vol., p. 257 ; Toullier, 6 vol., 106, and 7 vol., 521. Delvincourt, 1 vol., p. 124 ; Merlin, *Répert. de Jurisp.*, Verbo, *Inscription sur le Grand Livre*, § III ; Solon, *Des Nullités*, 1 vol., p. 43. No. 76, and Duranton, 2 vol., p. 598, who says : "*Sur les actes du tuteur* "*non autorisé.* Mais, au contraire, s'il n'a pas observé les for- "malités qui lui étaient prescrites, c'est un mandataire qui a "excédé les bornes de son pouvoir, c'est un individu qui a agi "sans mandat, relativement aux actes irréguliers, en un mot,

" c'est un étranger, *nam tutor in re pupilli domini loco habe-*
" *tur, cum tutelam administrat, non cum pupillum spoliat ;*
" d'où il faut nécessairement conclure que le mineur n'est
" point obligé, que les actes ne sont pas seulement rescindables
" pour cause de lésion, mais qu'ils sont nuls de toute nullité."
Pothier, Tit. 6, § 2, p. 606, referring to the maxim, tutor domini loco habetur, observes. " Cette règle a lieu pourvu que les
" contrats n'excèdent pas les bornes d'une simple administra-
" tion : un mineur n'a pas besoin de lettres contre le fait du
" tuteur que pour les actes et choses renfermées dans le pou-
" voir de son tuteur, c'est-à-dire, qui concernent l'administra-
" tion du tuteur. Et le tuteur, dans les choses qui excèdent
" son pouvoir, doit être regardé sans caractère." " So, Ferrière,
" *Des Tutelles*, p. 215. Le tuteur est considéré comme étant le
" maître, *Tutor domini*, &c. Théorême qu'il faut entendre
" relativement à l'autorité qu'a le tuteur d'administrer les biens
" pupillaires, car, s'il est question de les ébrécher, le tuteur n'a
" en cela aucun pouvoir, nam tutor, &c. Leg. qui fundum 7
" § in tutor 3 ff, pro emptore &c., décision qui n'a rien de mer-
" veilleux dès qu'on sait que nous ne pouvons transporter à
" autrui ce qui ne nous appartient pas. Leg. si filius 14 Cod.
" de Donationib." The tutor's administrative power is thus shewn to be *ad providentiam pupilli* and not to his prejudice. The authorities are conclusive as to the office of tutor itself and of his form of alienation, and the same doctrines are to be found in the law of Louisiana, a kindred system to our own, where it is held 'that the property of minors cannot be alienated by any other means than that prescribed by law 1 Martin, N. S. 324." " The sale of minor's property without the legal formalities is absolutely null, 1 Martin, N. S. 628, 10 M. 726." Minors are not bound by a sale of their property, even under judicial proceedings to which they are not parties. 5 M., N. S. 655." Were it otherwise, the provisions of law for the safeguard and protection of persons of tender age would be useless and the jurisprudence which declared them completely defeated. This disability to alienate is extended to all the property of the minor except as above stated for *meubles périssables* and moveables of inferior value, it is not limited to real estate or to immoveables only but embraces moveables also, as in England where the capitals of infants cannot be broken into, so also in this country, capitals invested are circled by the same protection. Of the many authorities upon this point, reference will be made only to a very few of the most applicable, Duparc-Poullain, 1 vol., p. 263, on the customary Laws of Brittany, remarks upon the tutor's disability to dispose of their minor's property. " Il ne peut pas y avoir
" de difficulté à l'égard des crédits qui ne sont pas susceptibles

"ni de prisage ni de vente. Il en est de même des actions sur "la Compagnie des Indes. Mr. Boucher d'Argis donne pour "motif que les actions ont, jour par jour, une valeur certaine "suivant le cours de la place. Mais nous avons un autre motif "pour décider, ces actions ont un revenu fixe, et elles ne "doivent pas être vendues sans un avis exprès de famille, &c." Meslé, *Des Tutelles*, with reference to the sale of *certains meubles*, namely the *meubles périssables* says: "Les dettes "actives des mineurs ne seront mises aux enchères, vendues ni "adjugées en gros, &c.," p. 137, so also, at p. 145. "Aussi ne "peut le tuteur, &c., compromettre, transiger, &c., ès causes "héritelles et de meubles riches et précieux sans l'avis de "parents et décret en justice; " so also at p. 242. "Il "est bon de remarquer que les meubles précieux des pu-"pilles et des mineurs *quæ servando servantur* sont réputées "immeubles, en sorte qu'on ne peut les vendre qu'en obser-"vant les mêmes solennités de droit que la vente des im "meubles requiert, &c., at p. 297, he also cites un arret of 6 "September, 1761," with reference to the unauthorized sale of offices, and observes. "Il en serait de même s'il s'agissait d'une "chose purement mobiliaire, mais d'une grande valeur et qui "formerait pour ainsi dire toute ou la majeure partie de la "succession." And Freminville, in his *Traité de la Minorité et de la Tutelle*, 1 vol., p. 260, observes, "l'injonction de vendre "les meubles est fondée en partie sur ce qu'on veut que le "prix qui en provient soit placé et devienne productif d'inté-"rêts. Ce motif même de l'art. 452 prouve qu'il ne doit pas "s'appliquer aux rentes constituées ou foncières, soit sur des "particuliers soit sur l'Etat, les annuités de ces rentes sont "les intérêts des capitaux." It may be here observed that these *Rentes Constituées* were merely investments of money to produce a certain interest, the rate of which was settled by the agreement of the parties upon the capital invested. Investments in bank stock, and especially the investments in in the shares in question, must necessarily come within the rule, inasmuch as they are really *productifs d'intérêts*. Dalloz, *Jurisp. du Royaume*, vol. 12, under the word Tutelle, has collected a variety of decisions bearing upon the points involved in this case, and remarks, at par. 68. "Les dispositions "du Code Civil qui interdisent aux tuteurs toute aliénation, "tout partage, toute transaction, sans l'entier et préalable "accomplissement des formalités qu'elles prescrivent, sont "absolues et exclusives de toute exception, encore bien que les "juges et le conseil de famille alléguerait le plus grand in-"térêt des mineurs. Même le juge ne peut s'écarter de la loi "sous prétexte d'équité." The modern French authors, Magnin, Duranton, Desquiron and others adopt and enforce, as a

fixed principle of law, even under the dispositions in the modern law, the tutor's incapacity to alienate *les rentes* or other productive and valuable property belonging to the minor; and the last cited author, in his *Traité de la Minorité*, pp. 183, 184, with reference to these *Rentes*, says: "On aperçoit facilement le motif de cette disposition, la "vente des meubles du mineur n'est ordonnée qu'afin d'ar-"river ensuite à des placements qui convertissent en biens "utiles et frugifères des Capitaux jusque là stériles. Or "les rentes ont déjà ce dernier caractère, l'obligation "de vendre ne devait pas être étendue jusqu'à elles." It is not easy to discover any difference between these *meubles précieux*, rentes constituées, Actions de Banque, &c., of the French and Lower Canadian law, and the capitals producing interest under the law of England. The same disqualification exists under that system as here against their unauthorized alienation, and the same protection is granted with respect to them by that law as by our own, for the infants to whom they belong. This protection and the necessity for the observance of the special legal formalities by Tutors, for the alienation of Minor's property, cast upon the Bank, as it would upon any holder of pupillary investments, the obligation not only to ascertain the extent and effect of the Tutor's power, but to be careful that those formalities had been followed for the disposal of the shares, and all this, unquestionably, at the risk of a direct liability in the event of neglect or malfeasance by the Bank. Were it otherwise, the Bank might maintain or transfer to itself the Minor's stock, for the liquidation of the tutors' private balance due to itself. Hence, this legal protection impressed the Bank with a trust character as to Respondent, from which it could not be freed by its own act; whether as trustee or as mere depositary of the investment of the estate or of the property of the Minor, it was the duty of the Bank to ascertain that the powers of the transferor or assignor of the stock in question were sufficient in law for the purpose of allowing the transfers to be made; but no such precaution appears to have been adopted. Moreover, the law not only reaches the malfeasant Guardian, Trustee or Tutor, but extends also to the holder of the funds, because, if the disability of the Tutor, Guardian, &c., be a legal disqualification from making any such transfer, and his alienation be a legal and absolute nullity, within the legally presumed cognizance of the party holding the trust estate or funds, his neglect or inobservance of the requirements of law for a valid transfer or change of those funds from the Minor to a third person, *ipso facto*, would render such holder a participator in the wrongful conversion, and subject him to

the direct liability towards the owner, to replace him in the situation in which he stood at the time of the transfer, and as if it had not been made; and that liability would be strengthened if the transfer had been made after an opposing notice to the contrary. Such cases have occureed in England and been so adjuged, as in *Sloman* vs. *Bank of England*, 14 Sim. 475, 485, where the Vice-Chancellor observes, "if one shew "that, upon a given day, Stock stood in his name, and he has "not authorized its transfer, the Bank is responsible to him, "that is to say, the Bank must make the account stand as it "ought to have stood. This appears to me to be the true view "of the case, and, according to that view, there would be a "direct right in any person who was interested in the stock "in question to file a bill against the Bank of England to have "any error occasioned by the Bank, covered." His Honor concluded his opinion by remarking, "the Bank having autho-"rized a transfer which they ought not to have sanctioned "are themselves now liable in a Court of equity to restore to "the parties complainant the stock as it stood immediately "before the transfer." It is true that the Bank of England are not bound to look beyond the legal title, nor do they take notice of trusts, otherwise, as it is said, they might be charged with all the trusts of the kingdom, 3 Ves. 58, "but, though "the Bank Statutes do not make them trustees of the public "funds for any person, if they voluntarily enter in their books "a trustee's account, they must, under certain circumstances, "become liable for the obligations of those trusts; they stand "much in the same relation to stock that a depositary of "goods does to the goods, if they have notice that the person "in whose name the stock stands is not the real owner or "holds subject to a claim, and they nevertheless allow the "transfers to be made, they may be responsible for the trans-"fer." 2 Y & Col. Ex. 209; 9 B. & C. 136; 1 Russ. 575. So also in general with respect to stocks, the dealer with the party who acts *ex mandato* must look to the mandate to see whether he is acting within its scope, 5 Ves. 211; 1 My. & K., 351; 7 Moore, P. C. 76: see also, *Bank of Ireland* vs. *Evans' Creditors*, 3 Irish L. R. (N. S.) 280. The Bank of England, as observed by the Vice-Chancellor, in Sloman's case, are only "the Parliamentary book-keepers of the public funds, with-"out being its trustees for any person," and, in this respect, are more favourably placed than the Bank of Montreal, a Joint Stock Banking Corporation, holding the investment of its Shareholders as its trading capital instrusted to its management for the production of revenue to them individually. The Charter of the Bank of Montreal, 4 and 5 Vict., ch. 98, did not contain the relieving provisions of its amended Charter of

1856, 19 Vict., ch. 76, in which, for the first time, appeared special enactments regulating the transmission of stocks in consequence of death marriage, &c., of a Shareholder, and by which the Bank were not bound to see to the execution of any trust, whether express, implied or constructive to which any share should be subject, &c., nor to the application of any money paid for dividends, &c., to a party receiving it in whose name the share stood in the bank books. These amendments do not govern this case, but are cited to shew that they had no existence in the Act 4 and 5, Vict., ch. 98, and that no statutory relief had previously existed against even the fiduciary responsibility mentioned in the amending Act. Again, the Bank of England were not bound to look beyond the legal title, and numerous instances occur of their recognition of such title, such as the authority and title of Executors, because, by the law of England, in them is the legal title, they are the legal owners of the stock, and the Bank of England have rightly made the transfers of stock upon their requisition, although the stock might have been specially devised by the will under which the Executor was acting. But, it must be observed, that the legal title of the Executor and that of the Tutor are not coincident; what legal ownership in his pupil's stock can be found in the office of Tutor? In the case of *Keane et al.*, vs. *Roberts et al.*, 4 Madd. *Rep.* p. 333, the V. Chan., Sir John Leach, says, "every person who deals "with an Executor, knowing his character of Executor "has necessarily implied, if he has not express notice of "the Will; but all dispositions made by a Will of perso-"nal property, are by law subject to a prior charge for the "payment of debts, and as a purchaser of real estate devised "in aid for the payment of debts, is not bound to in-"quire into the facts, whether the sale is made necessary "by the existence of debts, because he has no adequate "means to prosecute such an inquiry, so, he who deals for "for personal assets is for the same reason absolved from all "inquiry with respect to debts. He has a right to assume that "the executor sells in the necessary course of his administra-"tion, and it is upon this principle altogether indifferent what "dispositions may be made by the Will with respect to the "personal property for which he deals, for whether it be "specifically given or be part of the residuary estate it is "equally charged by law with the payment of debts; if it "were otherwise the powers of an executor would be wholly "inadequate to the administration of the Testator's estate." In almost all particulars of these rights and powers of Executors, Tutors are without right or power; true, they must pay debts if due, but they cannot realize of their own

free will, nor without the observance of the prescribed legal formalities, nor even then without an exposition rendered satisfactory to the Judge of the circumstances of the estate and of the necessity of the sale. Meslé p. 145, says : Le Juge ne peut pas permettre les ventes sous prétexte d'utilité. Il n'y a que la nécessité du payement des dettes qui puissent faire subsister la vente du bien du mineur," and of course, for the Judge's decision these debts must be shewn to exist as well as the means to be realized for their liquidation. Ferrière, *jurisp. du Digeste*, 1 vol., p. 637 : " Enfin, pour empêcher que l'aliénation des biens du pupille ou des mineurs faite par son tuteur &c., ne soit cassée, il faut qu'elle ait été ordonnée par le Juge qui en connaisse la nécessité. De sorte que, si ces deux choses ne se rencontrent pas en l'aliénation des biens des mineurs, qui sont l'ordonnance du Juge et la nécessité de l'aliénation, telle aliénation est nulle." Pothier, *Pandectes*, 1° vol., p. 251 : " Pour que la vente des biens du mineur, faite en vertu d'un décret, et pour acquitter des dettes ou pour tout autre motif d'urgence soit valide, on requiert le concours de quatre choses. Il faut 1° que le décret soit rendu par un Magistrat compétent ; 2° que le Magistrat l'ait rendu avec connaissance de cause ; 3° qu'il ne soit pas obreptice, et 4° qu'en vendant, le tuteur n'en ait pas dépassé les bornes du décret," and Ferrière, *des Tutelles*, p. 233 : " Il faut enfin que le Juge ordonne que le contrat de vente sera passé et la raison le veut de même, car dès que la vente doit être faite de l'autorité du Juge, il ne peut y avoir de vente jusqu'à ce que le juge l'ait prononcée." The legal title of the tutor is merely that of a simple administrator, as already stated, for the advantage of the minor, with absolute restriction in the control of the minor's property. " Lorsqu'il agit hors de ces pouvoirs, il cesse d'être tuteur, quoiqu'il en prenne la qualité." Duranton, n° 1064. It would be waste of time to urge further reasons for shewing that the tutor does not possess the legal title ascribed to the Executor by the English law. But, even this admitted power of the Executor does not, in all cases, relieve third persons treating with him from direct liability on his account. In the last case cited of *Keane & al.*, vs. *Roberts & al.*, 4 Madd. the Vice-Chancellor further remarked, " every person who acquires personal assets by a breach of trust in the executor, is responsible to those who are entitled under the will, if he is a party to the breach of trust. Generally speaking he does not become a party to the breach of trust by buying or receiving as a pledge for money advanced to the Executor at the time, any part of the personal assets whether specifically given by the Will or otherwise, because the sale or pledge is held to be *prima*

"*facie* consistent with the duty of an executor. Generally "speaking, he does become a party to the breach of trust by "buying or receiving in pledge any part of the personal "assests not for money advanced at the time, but in satisfac-"tion of his private debt, because this sale or pledge is *prima* "*facie*, inconsistent with the duty of an executor," and finally con-"cludes if a party dealing with an executor for the personal "assets pays his money to the executor so that it may be applied "to the purposes of the Will, he is not responsible for the executor's "mis-application of it; but, if in dealing with the executor he "does in truth pay his money for the private purposes of the "executor he is equally a party to the breach of trust, whe-"ther he applies his money to the private debt of the execu-"tor, or to the private trade of the executor." This distinction is adopted by a late author, Mr. Grant, in his treatise *on Banking*, p. 351. It is quite consistent with reason and sound argument to apply this distinction unreservedly to the tutor's conduct in this case, in which it cannot be denied that the transfers were made for his private debts and private trade, and that the allowance of those transfers was made by the Bank knowing their purpose, and thereby becoming *particeps criminis* in those illegal transfers. In the examination of this cause, I have considered it by the light of English jurisprudence, as well as by that in force in this Province, not only because of its applicability in reason and assimilation in principle to our own civil law, but because practical questions from banking operations and incidents in this Province, rest more closely for elucidation upon English than French law. Seeing then upon the whole matter, that the transferred shares were of that description of minor's property, which the tutor could not of his own authority alienate, that his actual alienation of them was an absolute nullity and gave right to their revendication and that of their profits and dividends, "*l'aliénation étant nulle* "*le pupille a le droit de revendiquer la chose aliénée et ses* "*fruits*," that the Bank had been culpably negligent in allowing the transfers to be made and participating in the wrongful act, giving thereby a direct action against themselves, not only to replace Respondent in her original position of shareholder of the shares in question, but also to pay to her the profits and dividends arising from them since their unauthorized alienation, seeing that Respondents are justified in treating these transfers as if they had not been made, and as if the stock were still standing to the account of the estate of John Simson in the bank books, the judgment of the court below in favor of Respondents, under the pleadings and evidence of record is correct and should be affirmed.

MONDELET, (C.) A. J. : Il n'y a à décider qu'une seule, mais une très importante question, la plus importante qui se soit présentée, depuis longtemps ; elle intéresse les parents, elle intéresse les enfants, elle tient à l'ordre même de la société, sous plusieurs rapports. La voici : Un tuteur peut-il, sans aucune formalité, en vertu du seul mandat qu'il reçoit de la loi, sans avis de parents, sans l'autorisation du juge et sans nécessité, vendre ou aliéner, par cession, transport ou autrement, des actions de banque du pupille ? Le jugement dont est appel, est motivé, de manière à dessiner exactement la question qui a été résolue dans la négative. Quels sont les pouvoirs du tuteur ? Qu'est-il ? Il n'est qu'un simple administrateur ; ses pouvoirs, par conséquent, ne peuvent pas excéder ceux d'un administrateur. " Le tuteur, dit Domat, est celui à qui on commet le soin de la personne et des biens du mineur ; et cette charge s'appelle tutelle, c'est-à-dire, l'engagement de prendre ce soin." " Le tuteur n'a de pouvoir que pour conserver le bien du mineur, et non pas lui nuire."p. 412. (Edn. 8° t. 1.) " Il ne peut enfin empirer en rien, la condition du mineur qui est sous sa charge." p. 410. Voici maintenant, en quelques mots, l'histoire et l'exposé de toute la jurisprudence romaine et française sur cette importante question ; c'est Domat qui parle : " Par l'ancien droit romain, le tuteur n'était pas seulement obligé de faire vendre les meubles, mais même les maisons, à cause du péril des incendies ; *domus* (*vel*) *aliæ res periculo subjectæ*. L. 5 § 9 *ff. de adm. et per tut* 4. 22. *Cod. de adm. tut.* L'empereur Constantin défendit de vendre aucun immeuble, ni même les meubles, qu'avec connaissance de cause, et ordonnance du juge, à la réserve des habits et des animaux dont l'usage n'était pas nécessaire au mineur, qu'il permit de vendre sans ordonnance du juge. 22, par l'ordonnance d'Orléans, art. 102, les tuteurs sont tenus aussitôt après l'inventaire, de faire vendre par autorité de justice, les meubles périssables, et d'employer les deniers en rentes ou héritages de l'avis des parens et amis.''pp. 415, 416. La seule exception qu'on trouve dans le droit nouveau, et encore, c'est en vertu d'un décret du 25 septembre 1813, c'est que " les mineurs ou interdits sont dispensés des formalités ordinaires, quand ils n'ont qu'à vendre qu'une seule action de banque." V. aussi Zachariæ, *Cours de droit français*, t. 5, n° 687, p. 654. Voici ce que dit Duranton (*Droit français*, t. 5, p. 544) en parlant de la loi du 24 mars 1806, relativement à la cession ou transport des rentes, soit sur l'état, soit sur particuliers." Les dispositions de cette loi ont été appliquées, par décret du 25 septembre 1813, au cas où le mineur serait propriétaire d'actions de la Banque de France : s'il n'en a qu'une, ou s'il a dans plusieurs, un droit n'excédant pas en totalité une action entière, le tuteur peut en

faire la vente ou le transport, sans autorité du conseil de famille." Chaque part, comme on le sait, chaque part ou action de la Banque de France est de 50 francs. Au n° 587, Duranton dit : " Avec l'autorisation du conseil de famille, le tuteur peut vendre et transférer les rentes, soit sur l'état, soit sur particuliers, excédant cinquante francs de revenu, ainsi que les actions de la banque. Pour celles au-dessous, il n'a pas même besoin d'autorisation ; mais il ne doit aussi les vendre que comme il a été dit au n° 554 et suivant. Mais encore, n'est ce que dans un cas de nécessité, car, dit Domat, " l'administration du tuteur s'étend à tout ce qui est nécessaire ou utile au mineur," p. 409. Il n'est pas hors de propos de s'arrêter quelques instants à une intéressante page de l'excellent ouvrage de Mr. De Molombe, t. 7, p. 373. C'est une dissertation sur l'histoire et la théorie des attributions et des pouvoirs des Tuteurs. Il part du principle : " *Tutor qui tutelam gerit, quantum ad providentiam pupillarum, domini loco habetur.* (L 27 *ff de administ. tut* :) Alors il parcourt toutes les périodes et les phases de cette jurisprudence, et discute la question. Mais, à la page 378, il arrive au principe : " *Tutor domini loco habetur, quum rem administrat non quum pupillum spoliat.*" (L. 7, § 3. *ff pro emptore.*) Entre autres passages, je trouve le suivant, qui semble fait exprès pour la présente cause. " Si enfin, vous supposiez que c'est en paiement de sa dette personnelle que le tuteur a cédé à son propre créancier une créance du mineur, le tiers devra alors aussi craindre cette objection, que le tuteur n'est plus dans son droit, *quum pupillum spoliat*, surtout si la créance du mineur, était à terme, bien garantie et productive de bons intérêts. Car encore une fois, si le tuteur représente le mineur, c'est pour gérer et conserver sa fortune, et non pour la perdre, et pour se l'approprier. Et le tiers qui participe à un acte dans lequel le tuteur en effet méconnaît à ce point, le caractère de son mandat et de son devoir, s'expose ainsi volontairement lui-même, à voir annuller cet acte contre lui : D'où il suit que ces sortes de traités ne sont pas d'une solidité parfaite, lorsque c'est le tuteur seul qui les consent, et que les tiers feront très-bien de demander qu'il obtienne une autorisation du conseil de famille." De Molombe ajoute : " J'aime mieux cette conclusion qui, en fait, se rapprochera souvent, j'en conviens, de celle de la doctrine que j'ai combattue. Mais je l'aime mieux, parce qu'elle est, selon moi, plus juridique et plus conforme à la théorie du code civil." Je n'ai introduit ici, cette dissertation de M. De Molombe, que pour faire voir que ce savant jurisconsulte, tout en s'efforçant de combattre la théorie qui harmonise avec nos lois, est vaincu par lui-même : il ne peut résister à l'entraînement qu'il ressent vers l'ancienne théorie qu'il finit par avouer être la plus juridique. Quand il s'agit de placer

des deniers appartenants à son mineur, il (le tuteur) doit en faire l'emploi en vertu d'un avis de parents." FERRIÈRE, *Dict. de Droit* t. 2, vo. *Tuteur*, p. 1055. Singulière anomalie que serait celle qui résulterait de ce que le tuteur qui ne peut faire l'emploi des deniers, sans avis de parents, aurait la liberté de les dissiper et de les perdre, sans y être autorisé ! Au reste, tout ce qui précède, est en parfaite harmonie avec notre droit du Pays, comme on peut s'en convaincre en recourant au *Traité* de M. Cugnet, sur les anciennes lois du pays, p. 129, sur l'art. 53, tit. IX, des *Tutelles et Curatelles*. "Les tuteurs et curateurs, dit-il, sont établis pour conserver, et non pour aliéner les biens, qui ne peuvent très certainement, *suivant la loi*, être affectés et aliénés que pour l'avantage des mineurs, et qu'il est de droit, que la raison de l'aliénation doit être prouvée et autorisée par décret du juge. C'est le sujet des des titres au Digeste. *De rebus eorum qui sub tutelâ vel curâ sunt, sine decreto judicis non alienandis vel supponendis ;* et du Code : *De prædiis et aliis rebus minorum sine decreto judicis, non alienandis vel obligandis.*" Si, après avoir consulté des autorités, on se livre tant soit peu au raisonnement, n'est-il pas tout naturel et suivant le bon sens, de se demander, quelle logique il y a à dire que celui qui n'a que le soin d'une chose, qui n'en a que l'administration, qui doit conserver cette chose, a droit de l'aliéner ? La seule modification qu'on puisse apporter à la rigueur de ce principe, me paraît être la nécessité, mais une véritable nécessité, dans l'intérêt du mineur. Et encore, il n'est pas laissé au tuteur, qui n'a que le soin de la chose, de juger *seul*, s'il y a nécessité ; il n'est pas même au pouvoir du juge *seul* de décider à cet égard, il faut qu'une assemblée de parents, en décide en connaissance de cause, et c'est sur cet avis de parents, que le juge, soit en l'homologuant ou en le rejetant, statue finalement sur cet important objet. Si, aux termes de l'art. 102, de l'Ordce. d'Orléans (Charles IX, janvier 1560,) le tuteur est tenu, après inventaire fait, de faire vendre, par autorité de Justice, les meubles *périssables*, obligé qu'il est, toutefois, d'employer en rentes ou héritages, *par avis de parents*, les deniers qui en proviennent, comment peut-on, sérieusement, prétendre, que, sans assemblée et avis de parents, il soit en droit d'aliéner des actions de Banque, à un montant considérable, placées là, à perpétuelle demeure, pour ainsi dire, par un père prévoyant, pous assurer l'existence de sa fille mineure, et qui sont bien éloignées d'être périssables, assurément. La tentative que l'on a faite d'assimiler les parts ou actions de Banque, aux rentes constituées, et l'argument qu'on a voulu tirer de l'autorité qu'a le tuteur de recevoir le remboursement du capital, vient échouer en présence de la toute simple observation, que par la

loi, non seulement il est autorisé, mais il est tenu de le recevoir; ce paiement n'est que l'acte du débiteur. Dans l'hypothèse même de la nature meuble de ces actions, toutefois, elles ne sont, et elles n'étaient pas périssables lors de l'aliénation qu'en a faite le tuteur; en sorte qu'à ce compte là même, il n'avait aucune autorité quelconque de les divertir de la sorte, de leur destination. Quelle ne serait pas l'injuste et la ridicule anomalie de ce procédé! Un tuteur ne peut pas, sans avis de parents et du juge, aliéner, même dans l'intérêt du mineur, un pouce de propriété immobilière, le mineur fût-il même immensément riche, et il aurait le droit, sans autorisation, d'aliéner les seuls moyens d'existence qu'un père aurait assurés à son enfant! C'est absurde! Quant à la Banque, elle n'a aucune excuse à offrir. Elle avait été avertie, elle connaissait, d'ailleurs, l'insolvabilité du tuteur. Il ne faut pas s'imaginer que parce qu'il importe que. dans le commerce, ces transports d'actions du Banque, se puissent effectuer facilement, que par là même, les lois qui règlent sagement l'administration des mineurs, sont effacées, et que sous le prétexte de commercer et d'agioter, les tuteurs auront en leur pouvoir de ruiner leurs pupilles, et les banques, en le leur, de prêter imprudemment et impunément, la main à de pareils manèges. Qu'on se désabuse là dessus, et que chacun apprenne qu'il y a des lois qui protègent les mineurs; ce sont nos lois, je ne dirais pas, françaises, mais nos lois du pays, fondées sur l'expérience des temps, que le progrès du commerce et la facilité qu'on désire attribuer aux opérations des banques, ne sont pas encore assez puissants pour renverser. Les tribunaux de justice sont là, comme un boulevard, qui s'opposeront, il faut espérer, avec énergie, à cet envahissement dangereux, et sauront tenir une main ferme à ce que ces lois soient exécutées. Je suis donc d'avis, que le jugement de la Cour de 1re instance, si sage, si bien motivé, si bien fondé en loi et en justice. soit confirmé.

DUVAL, J.: I concur in the judgment of the court, but for different motives (*motifs*) from those mentioned by the Superior Court. It seems to me, that the only question to be decided is: Can the tutor, without an authorization by a judge, and a *conseil de famille*, transfer bank-stock belonging to a minor? I set aside, entirely, all that has been said about the notice of the tutor's insolvency, which was given to the bank. The bank is not charged with watching over the circumstances and conduct of the tutor. He is an officer of justice and whether his conduct is good or bad the bank has nothing to do with it. It is not for the first passer-by to step into the bank and say, that the tutor is not solvent, and is improvidently or fraudulently disposing of his minor's property. The bank would say: " He is the tutor, and must be acknowledged as such, and we

must therefore do what he requires, so long as his requirements are within his capacity of tutor. You say, that he is insolvent, and that it is dangerous to allow him to handle this property, well then, present a petition to the court to do away with his tutorship (*en destitution de sa tutelle*)" There are forms of action by which a tutor may be deprived of his tutorship, and while such an action was pending, it might, perhaps, be proper for a bank to suspend action till the decision of the court should be obtained, and in the meantime place the monies in the hands of the clerk of the court, saying, " we acknowledge the rights of the Tutor but while this action is pending, we will assume no responsibility." The sole question here, I repeat, is whether a tutor without authorization has the power to transfer shares of bank-stock belonging to a minor ? Under the Roman Law, the tutor had the right to sell moveable goods only, and for some purposes only. Perhaps that law was more perfect than the code Napoléon. Before the code, the law was regulated by the Ordonnance. It is evident, that this law was copied from the Roman law, for it is in the same terms, speaking of articles which perished in using. Unfortunately, that law did not go quite so far as the Roman law. There is an article in Roussilhe which shews, that this *lacune* has been remarked, but yet, when I am asked, what are the duties of a tutor ? I reply, simply those of an administrator. He has, therefore no right to change the investment of money. The tutor has not done wrong in this case *because*, as it is stated in the judgment, the bank shares are reputed *real* property, for there is our own statute to say, that they are to be reputed *personal* property ; and this for all purposes, as for successions, and the like. But the explanation is to be found in Proudhon's *Traité du Domaine de la propriété*, in which he shews, that the tutor's power does not extend to the disposal of property which produces revenue. Many authors, under the old law, allow tutors the right of disposing of property which does not produce revenue, and even the receiving of moneys, placed out at interest, which may fall due. But the latter example does not apply to the present case. The investment here was of a permanent kind, and had been made by the father for the purpose of producing revenue. The tutor, therefore, had no right to change the investment thus selected. Proudhon even says, that the tutor cannot sell very precious moveables without authorization and a *conseil de famille*, and that he must not change the investments. There was, doubtless, perfect good faith in this case on the part of the bank ; but the tutor was not authorised to make the transfers, and the bank, in permitting the transfers, having wronged the minor, the action was, in my opinion, well founded, and the judgment ought to be confirmed.

LA FONTAINE, C.-J. : Une seule questiou se présente dans cette cause, mais elle est de la plus haute importance ; elle intéresse vivement la société, plus particulièrement la classe des mineurs auxquels les lois accordent, et avec raison, une protection toute particulière. Un tuteur (surtout un tuteur notoirement insolvable et en déconfiture,) peut-il à son gré, et sans observer aucune formalité, vendre les parts de banque de sa pupille ? Charles Michel Delisle, beau-père de l'Intimée, et son tuteur, vend, pendant sa minorité, trente actions dans le capital de la Banque de Montréal, formant £1500, et appartenant à l'enfant mineure, comme héritière de son père, feu John Simson. Il fait cette vente privément, sans avis de parents, et sans autorité de justice. Il était alors insolvable et en déconfiture, de manière que les £1500 (principal et intérêts) sont perdus pour sa pupille, l'Intimée, si la vente est maintenue. La Banque de Montréal connaissait le fait de l'insolvabilité et de la déconfiture de Delisle, lorsqu'elle enregistra dans ses livres le transport qu'il avait fait des actions de l'Intimée. Il lui avait été en outre notifié par écrit de la part du subrogé-tuteur de l'enfant, de ne pas payer à Delisle. Dans ces circonstances, le transport est-il nul, et s'il est nul, la nullité est-elle absolue ? " Par le droit des pandectes, la vente de tous les meubles du pupille, et de ses maisons de ville, était, pour celui qui administrait la tutelle, une charge principale de sa gestion." *Pandectes de Justinien*, par Pothier, traduites par Bréard-Neuville, tome 9, p. 513. Mais Constantin défendit de vendre d'autres biens des pupilles, que ceux qui étaient susceptibles de dépérir par l'usage, et les animaux superflus." *Ib*, p. 515, et tome 10, p. 237. Voilà pour le Droit romain ; voyons maintenant pour l'ancien droit français qui est le nôtre. L'article 102 de *l'Ord. d'Orléans*, du mois de janvier 1560, porte : " Les tuteurs et curateurs des mineurs seront tenus si-tôst qu'ils auront fait inventaire des biens appartenant à leurs pupilles, faire vendre par autorité de justice les meubles périssables et employer en rentes ou héritages par avis de parents et amis, les deniers qui en proviendront avec ceux qu'ils auront trouvés comptants, à peine de payer en leurs propres noms le profit des dits deniers." L'Ordonnance paraît être conforme à la Constitution de Constantin, dont elle laisse subsister la défense de vendre les meubles du pupille, sauf le cas de l'exception qu'elle permet. Et dans ce cas, elle prescrit, de plus, la formalité que le tuteur aura à suivre, et pour la vente et pour l'emploi des deniers. Si, pour vendre des meubles périssables, le tuteur était obligé d'avoir recours à l'autorité du Juge à plus forte raison devait-il y avoir recours pour la vente de meubles qui ne l'étaient pas, lorsqu'il pouvait devenir à propos de les vendre. Le tuteur est chargé d'administrer ; or vendre, ce n'est plus administrer.

Il ne peut donc pas dire que la disposition des meubles lui appartient, à moins que ce ne soit dans les cas particuliers autorisés par la loi, et encore est-il astreint à observer certaines formalités. " Nanti des effets du pupille le tuteur est obligé de mettre son attention à vendre les meubles périssables, et à les vendre non de son autorité privée, comme le lui permet le droit romain, mais bien d'autorité du juge, ainsi que le tiennent Bouvot, t. 1, part. 2, sous le mot *tuteur, quest.* 4, et Graverol sur Laroche, liv. 6, tit. 78, art. 2 doctrine fondée sur la formelle disposition de l'art. 102 de l'*Ord. d'Orléans.* Il y a eu dans les temps postérieurs de pareils règlements." Ferrière, *Traité des Tutelles*, p. 166. L'un de ces Règlements est un arrêt consigné dans les Registres des *Grands Jours* tenus à Lyon, le 27 novembre 1596, et rapporté par Henrys, t. 2, p. 651, de l'édition de 1772, par lequel arrêt il est fait défense aux tuteurs de retenir les meubles des mineurs pour le prix de la prisée, et à eux enjoint de les faire vendre au plus offrant et dernier enchérisseur avec les solennités accoutumées. On lit à la page 105 du *Traité des Tutelles*, par Gillet, (Paris, 1686) ; " Les tuteurs ne peuvent vendre aucun immeuble appartenant à leurs mineurs sans décret ; mais à l'égard des meubles, excepté les meubles précieux qui tiennent lieu d'immeubles, aussitôt que l'inventaire est achevé, ils les peuvent faire vendre par un sergent *au plus offrant et dernier enchérisseur.*" Ainsi, faut-il toujours que la vente soit faite publiquement. La vente publique protège les intérêts du mineur, en même temps qu'elle atteste de l'honnêteté du tuteur et de sa bonne administration. Si l'on consulte Meslé et les autres auteurs cités par les Intimés, l'on verra que tous concourent à établir la nécessité qu'il y a pour le tuteur de procéder en la manière qui vient d'être exposée, et qu'à défaut par lui d'observer les formalités prescrites, il outrepassait les bornes de son pouvoir ; il y avait alors nullité absolue, sans qu'il fût nécessaire de prendre des lettres de rescision. Quoique des immeubles puissent appartenir à des sociétés anonymes, cependant les actions en banque, tant que dure la société, sont déclarées, par la loi, être mobilières. Il est nécessaire qu'il en soit ainsi, si l'on veut que les actionnaires jouissent et disposent de leurs actions. Je me permettrai de citer ici un passage du *factum* des Intimés, qui me paraît être d'un très grande exactitude : " Nos actions de banque sont meubles il est vrai, mais ce ne sont pas des meubles réels, ce ne sont pas des créances ordinaires exigibles, le capital souscrit est placé là à perpétuité, pour en obtenir seulement l'intérêt ou les profits. Plus fixe encore que le capital d'une rente constituée, le capital n'en est jamais exigible par l'actionnaire et la corporation qui en est dépositaire ne peut jamais exiger qu'on en reçoive le rembour-

sement. Pour en opérer la conversion, le tuteur doit faire un transport, une vente du capital investi, il lui faut provoquer par l'entremise d'un tiers, et solliciter de lui le rachat de cette rente non rachetable de sa nature. On sait que parmi nous, des fortunes considérables sont représentées par cette seule espèce de propriété. Si des parents ont jugé à propos de faire eux-mêmes la destination de leurs biens, et de les convertir en actions de banque; comment le tuteur s'arrogerait-il seul, de sa propre autorité, le droit de changer la destination, faite par le père de famille dans l'intérêt de ses enfants. S'il ne peut vendre une rente constituée, pourquoi lui serait-il permis de vendre des actions de banque, "*ubi eadem ratio, ibi idem jns.*" Le moins qu'on pourrait exiger pour une disposition aussi importante, concernant quelquefois toute la fortune du pupille, serait bien l'avis des parents et l'autorité du juge. Dans ce cas même il lui faudrait au moins en démontrer la nécessité et justifier cet acte par l'intérêt de son pupille, *nam tutor in re pupilli domini loco habetur cum tutelam administrat, non cum pupillum spoliat.*" Dans le nouveau droit français, qui se rapproche un peu plus des *Pandectes* romaines, en autant qu'il fait un devoir au tuteur de vendre tous les meubles autres que ceux que le conseil de famille l'aurait autorisé à conserver en nature, le mineur est encore entouré d'une bien sage garantie, car le tuteur doit faire la vente " en présence du subrogé-tuteur, aux enchères reçues par un officier public, et après des affiches ou publications dont le procès verbal de vente fera mention." *Code Civil*, n° 452. La raison qui fait prescrire la vente des meubles d'un mineur, est l'intérêt même de ce mineur. C'est pour lui créer un revenu. Mais la même raison n'existe pas quand il s'agit d'un placement de deniers qui a été fait par le père du mineur, et qui produit régulièrement des revenus annuels. Il y a là *destination du père de famille*, que le tuteur doit respecter et qu'il ne doit pas détruire ou changer sans l'avis des parents des mineurs, ou sans l'autorité du juge. On objecte que le remboursement des rentes constituées peut se faire au tuteur, et l'on prétend en tirer argument en faveur de l'Aplante. Il y a une très grande différence entre l'un et l'autre cas. Le remboursement d'une rente constituée n'est pas l'acte du tuteur ; c'est l'acte du débiteur, qui a droit de forcer et qui force le tuteur à recevoir. Mais rien ne forçait Delisle, le tuteur à vendre les parts de Banque. S'il y avait nécessité, ou avantage de les vendre, il devait en justifier devant le juge en la manière ordinaire. Il les a vendues, non pour le profit du mineur mais pour son propre avantage ou pour mieux dire, pour en dissiper le montant au préjudice du mineur. La règle de l'ancien droit français qui prescrivait certaines formalités

pour la vente des biens des mineurs, fait et a toujours fait partie du droit du Bas-Canada. Notre ancien compilateur, Cugnet, l'atteste, tit. 9, des "*tutelles et curatelles*," p. 129. Il faut ou décret du juge ou vente publique, si ce n'est même les deux à la fois. Lorsque ces formalités ne sont pas observées, le mineur doit avoir tout le bénéfice de la protection légale qui lui est accordée. On ne saurait le priver de cette protection, si ce n'est en prouvant pour le moins, que la vente faite par le tuteur a tourné à l'avantage du mineur. Judgment of S. C. confirmed.

Against this judgment the Bank of Montreal appealed.

Mr R. PALMER, Q. C., and Mr CHARLES E. POLLOCK, for Appellants: As the Bank shares were personal estate and not *immeubles fictifs*, the sales of such shares by the Tutor were valid according to the law prevailing in Lower Canada, and binding upon the Ward. The effect of the judgment of the Court of Queen's Bench is of the utmost importance, as the practice and understanding of the legal and notarial profession in Lower Canada has hitherto been, that dealing by a Tutor, with the personal property of his Ward are valid as regards third parties. If the decision appealed from be sustained, the law will be unsettled and many past transactions impeached. It is also a material consideration to be kept in view that the Judges of the Court below were not unanimous Mr Justice AYLWIN being of opinion that the sales were valid. The majority of the Judges, however held, that a Tutor had not the power of alienating, even moveables, except *meubles périssables*, without the concurrence of the *Conseil de famille*, or the authority of the Court. First, It will be necessary to investigate the principles of the law as administered in Lower Canada. The law of Lower Canada is founded upon the old french law, which is framed on the Civil law, modified and regulated by certain Customs and *ordonnances*. Nothing is to be found upon the point at issue in the *Coutume de Paris*. The question, therefore, must be determined by the general French law. For that purpose it will be convenient to consider in the first instance, what was the Civil law upon the subject in contention? By that law the Tutor stood in the place of the Father, and was *Dominus* for purposes of administration, and clothed with a plenary power of alienation, subject to an account, which he was compellable to render; the fundamental principle of the the civil law being opposed to any restriction whatever on the tutor's power to dispose of the property. A tutor was originally bound to alienate without any formality, and without making any distinction between moveables and immoveables. A general description of the powers and duties

of a tutor is laid down in the *Digest, de tutelis*, lib. 26, t. I, sec. 1, from which it appears, that the office of tutor was originally contemplated in the light of a personal guardianship. In his capacity of personal guardian, the tutor naturally became the manager of all the minor's property, whether real or personal, including full power of alienation at his discretion, provided the alienation was *bonâ fide*. All he had to do was to account for the tutorship when the minor came of age. *Digest, de administratione et periculo*, lib. 26, t. 7, sec. 27. A similar passage in the digest, lib. 26, t. 7, ch. 56, shows that special directions in the will of the father of the minor could not restrict the power of the tutor, for circumstances might change, which would render an unfettered power on the tutor's part indispensable. If, then, the father of the ward could impose no such limitations, how can the *Conseil de famille*, impose them now? It was considered that, unless a purchaser could make a good title by himself, the minor would be a sufferer. Digest, lib. 26, t. 7 ch. 12, sec. 1. Now, if we apply these principles to the present case, it being apparent that no charge of fraud against the transferees can be supported, they stand in the position of *bonâ fide* purchasers for value; and the remedy of the ward, in the first place, is clearly against the defaulting tutor, not Appellants; possibly, Respondent, *Simson*, might follow the property into whatever hands it has passed, but the intermediate purchasers are secure. Although by the civil law a tutor had the power of alienation and charging the property, he was responsible for the loss, if any was sustained. Pandects, lib. 27, t. 7, tome 10, p. 213 (by Pothier). The exercise of that power gave rise to the important distinction of the tutor's power over *mobilia* and *immobilia*. The edict of Severus, Pandects, lib. 27, t. 9 (by Pothier), tome 10 p. 232, which prohibits the tutor selling lands in the country, provides, in certain cases, that the tutor must first go to the *prætor* to obtain an order for sale of property in land and houses of the minor, which protected him from the consequences of what else would have been a breach of the law. Still, however, the tutor had no option but to sell what was within the range of his independent authority, namely *mobilia* and *prædia urbana*. Pandects, lib. 26, t. 7, (Pothier's Pandects, tome 9, p. 512.) By a decree of Constantine cited ib., lib. 10, p. 237, property in town was put on the same footing with *prædia rustica et suburbana*. By this edict it may be assumed that real property was inalianable by the tutor's independent authority. It is remarkable that at this period no mention is made in the edicts of the council of relations. It may, therefore, fairly be presumed that, under the civil law, the interposition of such a Council against the Tutor's autho-

rity was never contemplated. That being so, it is clear that. by the Civil Law of Rome, the Tutor was enabled, of his own authority, to sell, at least, the incorporeal personal property of the minor, which is all that is contended for, or concerns the present case. This brings us to the next branch of the case, namely, how far, and subject to what modification, this power of the tutor was received under the old French Law, or the *Droit Coutumier*. The first authority to be found on this question is the Edict. of Orléans. The powers are thus defined: "*Les tuteurs et curateurs des mineurs seront tenus si-tôt qu'ils auront fait inventaire des biens appartenants à leurs pupilles, faire vendre par autorité de justice les meubles périssables, et employer en rente, ou héritages, par avis de parents et amis, les deniers qui en proviendront avec ceux qu'ils auront trouvés comptants, à peine de payer en leurs propres noms le profit des dits deniers,*" *Ordonnance d'Orléans*, janvier, 1560, art. 102, *Anc. Lois Franç.* Isambert, Tome XIV, p. 89. Again Pothier, *Traité des Personnes*, part 1, tit. 6, sec. 4, art. 3, sec. 2, states the power of the tutor in these terms: "*Le pouvoir du tuteur sur les biens du mineur est tel que tout ce qu'il fait par rapport à leur administration a la même efficacité que si tous ces biens lui appartenaient. De là cette maxime de droit: Tutor domini loco habetur,*" which is in fact an entire adoption of the Civil Law upon this point. There is also an important passage in De Molombe, *Cours de Droit*, Tome VII, p, 371, art. 597, respecting the sale of "*meubles*" by the tutor's authority. He remarks that the authorities in treating of the sale of "*meubles corporels*" appear not to have considered the tutor's duty with reference to "*meubles incorporels*," such as stock, or debentures, and says: "*La solution la plus juridique est celle qui voyant dans le tuteur le représentant général du patrimoine pupillaire le regarde comme capable de faire seul et sans formalités à l'égard des tiers, les actes pour lesquels la loi en effet n'a pas exigé de conditions ni de formalités.*" Arts. 452, 457. Now, the maxim of the Roman Civil Law is, "*Tutor qui tutelam gerit domini loco habetur,*" which rule was adopted by the French Law. Hence the principle of that law, that the act of the tutor was that of the minor, *Pothier, Des Personnes*, part 1, tit. VI, art. 3, s. 2, adopts that rule, and that the tutor being placed by law in the situation of *dominus*, should have as much power as the *dominus*, Denizart, Tome IV, *voce* "*Tuteur*," n. 75, confirms it. So, Meslé, "*Traités des Minorités*," Tome 1, ch. VIII, No. 17, asserts that originally a Tutor had complete authority for the sale of the minor's property. Domat sanctions this view. It must be admitted that, generally, the Tutor had not authority to alienate "*immobilia et*

cetera pretionem immeubles et choses précieuses" without the *décret du juge*, which by the french law, corresponded with the *Prætor's* decree under the civil law; but that does not apply to Bank shares. Upon this point we rely on De Espeisses, Tome 1, p. 573; Meslé, *Traité des Minorités, des Tutelles et Curatelles*, Tome 1, ch. VIII, p. 136, No. 9; p. 151, No. 3; ib. Tome 11, p. 35; Ferrière, *Juris. du Dig.*, Tome 1, p. 637. Toullier, *Droit Civil*, liv. 1, tit. X, sec. 3 Tome 11, p. 387, art. 1222; ib. p. 369, art 199; referring to the sale of "*immeubles*," enumerates what act requires the authority of the *Conseil de famille*. He makes no exception of *rentes*. Nothing appears from the authorities by which the tutor's power was interfered with, but his proceedings, unsupported by a decree, would not be protected by his position as tutor, so that he would be liable. The *autorité de justice* relied upon by Respondent, does not mean that the court creates an authority, for that already exists, but merely that it puts it in motion. From these authorities it must be taken as clear that the duties of the tutor are analogous to those of an executor by the English law. In fact, the principles of the English law which govern the duty of an executor are drawn from the Civil Law. By the English law, the personal estate vests wholly in the executor. He can sell of his own accord, all, or any part of the assets, legal or equitable, though he is liable to render an account, in a suit in the court of Chancery for his dealings. But upon the sale of chattels by the executor the purchaser is not required to see, to the application of the purchase-money. The remedy, if the executor exceed his powers, is not against the purchaser, but the executor. An agent is accountable to his principal only; therefore, if an executor employ a banker to sell out part of the testator's stock, and remit the proceeds to him, the banker, even though he may have reason to believe that a misapplication is intended, is bound to transfer the money, and does not thereby render himself liable. *Keane* vs. *Robarts* (1) *Hope* vs. *Liddell* (2). Suppose that *DeLisle* had been the executor, or legal personal representative, he would have been bound to get in these shares and convert them into money, in order to carry out the testator's will. Would it not be the duty of Appellant's implicitly to obey his directions and transfer the shares? They would be compelled in equity. *Franklin* vs. *Bank of England* (3). An executor may be answerable, but neither the transferees of the shares nor the bank acting *bonâ fide* could be made answerable. The obliga-

(1) 4 Madd. 332.

(2) 21 Beav. 202.

(3) 1 Russ. 575.

tion of Appellants to register the transfers was not affected by the known insolvency of the tutor, or by the protest of the sub-tutor. Then as to the powers of the sub-tutor. His duty is limited to the mere superintendance of the tutor. If he suspect dishonesty on his part, he may move the *conseil de famille*, and procure a change of tutor. The property of the ward, however, is utterly beyond his control. He could have taken proceedings to set aside the appointment of *DeLisle* as tutor, and he might, if he thought fit, not only protest, but could have got an injunction from a Court of Justice to prohibit alienation of the stock, but the protest had no legal effect whatever on the Bank. Surely, the Bank cannot be expected to supply the neglect of the Sub-tutor. No direct *veto* on the alienation of the shares was ever in this case put forward by the *Conseil de famille*. With respect to the Tutor, we submit, whether under the precepts of the Civil Law, or the old French law, or by analogy to the position of an Executor by the law of England, he was placed in the position of *dominus*, with respect to personal property, as these Bank shares were, and could dispose of it. With regard to effect of the sale of the shares upon third parties, the *autorité de Justice* must be treated as a nullity, as it is merely a direction which justifies the Tutor in doing what he already has the power to do. He had undoubtedly power to sell *meubles périssables*, and it then remains to be considered whether these shares of Bank stock are *meubles périssables*, and not either *immeubles* or *immeubles fictifs*. The principle of the old French law was *Mobile viles possessio*. Marcadé, *Explication du Code Civil*, Liv. 1, Art. 460, Tome II, Liv. 1, tit. X, p. 254. Now, the judgment of the Superior Court treats Bank shares as *immeubles fictifs*, but shares in the Bank must necessarily be liable to considerable fluctuations in value, possibly to permanent depreciation. The authorities on the old French law do not support that view. Loysel, *Inst. Coutumières*, Liv. II, tit. I, No 11. Brillon, *voce, meubles, mineurs*, p. 365; Meslé, Tome I, ch. VIII. It will be probably argued on the other side, that the law of the 24th March, 1806, and the decree of the 25th of September, 1813, treating of *Rentes sur l'Etat*, and *actions de Banque* assume them to be only transferable under the authorization by the *Conseil de famille*, and according to the formalities prescribed by law. These laws, however, have no direct authority in *Lower Canada*, as they bear date long after the separation of that Colony from France. They are not declaratory of the previously existing law. Duranton, *Cours de Droit Français*, note to No. 555. Cochin, Tome V, part. XIII, p. 727, explains the peculiar position of "*rentes constituées*," and the result of the authorities is, that

the Bank shares in question come under the denomination of "*Meubles.*" If, however, that position cannot be maintained by the general law, yet, by section 20 of the Canadian Act, 4th and 5th Vict., c. 98 (1) (by which the Bank was established) the shares are expressly declared to be personal estate and transmissible. It is impossible, therefore, to deny the shares the quality of "*Meubles.*" Again, it must not be lost sight of that such shares are commercial commodities, liable to rise or fall in value, according to the circumstances of the market. They are not "*immeubles fictifs,*" or "*choses précieuses,*" consequently, they were under the control of the Tutor. Lastly, if there be any question respecting the tutor's right to make such transfer, it can only be either between him and the Respondents, or between them or the transferrees. But Respondent, *Simson,* having instituted an action against the tutor "*en redditiion de compte*" of his *gestion,* and having obtained judgment against him for the *reliquat* or balance thereof, it must be presumed that he, in that action, duly accounted to that Respondent for the proceeds of the sales of the shares, and she must be taken to have elected her. remedy, and is thereby estopped from proceeding against the Bank.

Mr. WICKENS and Mr. GADSDEN, for Respondents: By the law of *Lower Canada,* which governs the case, in the circumstances, the alienation of the property of the minor by his tutor was absolutely void, and not, as argued by Appellant's Counsel, voidable. The case is, therefore, to be considered purely as one of Canadian Law, and no analogy can be drawn from the English Law relating to executors; but, if that were necessary, the authorities are conclusive as to the liability of the Bank, SLOMAN vs. THE BANK OF ENGLAND (2). In that case, one of two trustees of a sum of stock sold it out under a power of attorney, to which he had forged the signature of his co-trustee, and absconded; under these circumstances it was held, that the *Bank of England* was compellable to re-invest the stock in the name of the other trustee. Neither does the power of an executor in all cases relieve third persons treating with him from liability. In KEANE vs. ROBARTS (3), the vice-chancellor *Leach* states the rule in these terms: "Every person who acquires Personal Assets by a Breach of Trust or *Devastavit* in the executor, is responsible to those who are entitled under the Will, if he is a Party to a Breach of Trust. Generally speaking, he does

(1) See *Ante*, p. 235.

(2) 14 *Sim.* 475.

(3) 4 *Madd.* 357.

become a Party to the Breach of Trust by buying, or receiving as a Pledge, for money advanced to the executor at the time, any part of the Personal Assets whether specifically given by Will or otherwise; because, this sale or pledge is held to be *primâ facie* consistant with the duty of an executor. Generally, speaking, he does become a Party to the Breach of Trust by buying or receiving in pledge, any part of the Personal Assets, not for money advanced at the time, but in satisfaction of his private Debt; because this sale, or pledge, is *primâ facie* inconsistent with the duty of an Executor." And he goes on to say: "If a Party dealing with an Executor for the Personal Assets pays his money to the Executor, so that it may be applied to the purposes of the Will, he is not responsible for the Executor's misapplication of it; but if, in dealing with the Executor, he does in truth pay his money for the private purposes of the Executor, he is equally a Party to the Breach of Trust, whether he applies his money to the private Debt of the Executor, or to the private Trade of the Executor. This distinction applies to the conduct of Appellants. The transfers were made for the payment of the Tutor's private debts, and the Bank was aware of the intention, and thereby became participators in the illegality. As the Bank had notice by the Subtutor, they are responsible for the transfer of the stock, *Humberstone* vs. *Chase.* (1) Our contention is, that the power of the Tutor over the property of his Ward, according to the law in force in Lower Canada does not enable him to alienate property which is, in legal contemplation, immoveable, to which class of property shares in the Bank of Montreal, we insist, properly belong. The argument of Appellants upon this point proves too much, as they are obliged to admit that the power of the Tutor over property of this description is so absolute as to enable him to alienate it by his sole authority under any circumstances. But, however, as Respondents rely upon the general law of Lower Canada, it will be necessary to go into the history of the Canadian law with respect to the power of the Tutor, for it is important both to examine the authorities and to explain the principles upon that branch of the law as now received in Lower Canada. In this history there are three stages. First, the Civil Law of Rome; second, the old law of France; and, thirdly, the modern law of Lower Canada. The Code Napoleon has no application whatever in this case. Before the promulgation of that Code, the general rule was, that the Tutor must preserve the property of the Minor; now, it is that he must alienate. It is necessary, on this account, to notice whether the writers who examine this

1) 2 *Yon* and *Coll.*, 209.

question wrote before or after that Code. In the first place, what is the power of the Tutor by the Civil Law? *Voet*, in his dissertation on the *Pandects*, Lib. XXVII, tit. IX, lays down the law, and catalogues the restriction laid by it on the Tutor's power of alienation in these terms: "*Quamvis autoritas tutorum magna sit, et in multis, imo plurisque casibus, infirmum suppleat pupillorum judicium, negotiis per eos contrahendis. Quandoque tamen sufficiens non est: idque potissimum in rebus pupillorum alienandis usu venit. Nam etsi ante orationem severi, et ad eam secutum senatus consultum, solâ tutoris autoritate processerit rerum pupillarium alienatio, atque devisio, postea tamen aliter fieri ut plurimum non potuit, quam si interpositum fuerit magistratus decretum.*" *Voet* then goes on to speak of the restrictions imposed by *Severus* and *Constantine*, on the alienation of landed property, and proceeds: "*Et generaliter, rerum omnium immobilium, utcumque sterilium, alienatio interdicta fuit, uti et mobilium eorum, quæ servando servari possunt, nec tempore pereunt, veluti, aurum, argentum, vestes, gemmæ, aliaque mobilia pretiosiora; solâ relictâ tutoribus licentiâ alienandi sine decreto res tales, quæ servando servari non possunt, quales sunt fructus, animalia superflua, vestes attritæ, et alia his affinia.*" Farther on, at sec. 2, he continues the same subject in these words: "*Sub rebus autem pupillaribus alienari prohibitis etiam hic continentur res illæ incorporales, quod immobilibus quantum ad plurimos juris effectus assenseri solent. Ac proinde non sine decreto procedit alienatio emphyteusios aut superficiei. Nec salinarum aut fodinarum metalli, cretae, arenae et similium. Sec nec absque decreto licita usus fructus aut aliarum servitutum tam personalium quam realium remissio. Idemque circa reditus annuos aut census remittendos, vel in alium transferendos, statuendum videtur.*" Such, according to *Voet*, were the limits placed on the Tutor's authority under the Civil Law. Then, after remarking on a case which had arisen, whether a floating water mill was to be considered as included in these restrictions, as it partook of the nature both of "*mobilia*" and "*immobilia*," he goes on: "*Et quamvis molendinum natalite non modo res mobilis sit, sed et fortuitis pluribus obnoxia casibus atque periculis ex et violentia fluminis, multis que insuper ac gravioribus impensis conservanda, sic ut à nonnullis in numerum rerum quae servando servari nequeunt et abit sine decreto distrahi possunt, referatur.*" *Montanus de tutelis*, cap. 33, n. 176. "*Verius tamen sine decreto molendinum tale alienari non posse; cum utique constet, illud rem mobilem pretiosam esse, atque aptam asservationi at que sunt vestes pretiosae, quarum alienatio permissa non est.*" Therefore, even if the most liberal test be

adopted, that property may be alienated without the sanction of a court, if it comes into the category of things "*Quae servando servari non possunt*, these shares can hardly be held alienable by the Civil Law; but if *Voet* states the law accurately the restriction is still more sweeping, for a floating watermill comes within its limits as being a thing of too great value to be submitted to the tutor's own discretion. Strictly, the law, after the time of Constantine, appears to have been, that the tutor had no power to alienate valuable moveables without a decree autorizing him so to do, any more than he had power to alienate absolute "*immeubles*" without such a decree, but whether these shares be moveables or immoveables, the tutor had no power to alineate them without the sanction of a court. His duty was confined to administration and administration is totally distinct fron alienation. Heineccius, *Recitationes*, vol. 1, p. 430, s. 468, Dupin's Edit.) enunciates the same principle. The old French law adopted precautions even more stringent. The *Ordonnance d'Orléans* requires the "*autorité de justice*" for the sale of all "*meubles périssables.*" Ferrière, *de la Minorité et de la Tutelle*, part. iv. sec. 2, p. 166; ib. sec. 7, p. 215, especially points out the restrictions in the civil law imposed by legislation in France, especially under the *Edict of Orléans*, January, 1560, art. 102. The incapacity of alienation attaches not merely to real estate or immoveables, but to many descriptions of moveables also; and this is equally the case both under the civil law and under the French law. Both from principle and authority, it is clear that this incapability extended to "*choses précieuses*," "*rentes constituées*," "*actions de banque*," and many things besides, which are not immoveable in the ordinary acceptation of the term. The real test is not the character of the property, but their value and capability of preservation. Meslé adopts this proposition, *Traité des minorités*, tome 1, ch. 8, pp. 134, 135, 136, n° 8. He quotes the *Ordonnance d'Orléans* and observes its effect in these words: "*L'article* 102. *de l'Ordonnance d'Orléans ordonne aux tuteurs de faire vendre par autorité de justice les meubles périssables de leur mineur.*" The *autorité de justice* was a solemn autorization from a competent Court, and was put in force with clear formalities, as Meslé describes it. *C'est prendre du juge une ordonnance qui assigne le jour de la vente, qui ordonne de la publier et qui committe un sergent pour la faire. Il y a des lieux ou outre le sergent, le juge, committe un notaire, ou le greffier pour écrire la vente.* How, then, can it be said, that, when forms and solemnities like these are prescribed, they can be disregarded with impunity? As to the bank shares in question, the principles which govern the whole system of the law as to tutors, require that such property

should be inalienable, except with the usual formalities. Bank shares are the safest and simplest means of preserving property; their value varies but slightly, and they are scarcely liable to sudden depreciation or destruction. The spirit of the authorities is against their alienation. Freminville, *de la minorité et de la tutelle*, tome 1, p. 260, lib. 5, t. 1, ch. I, asserts distinctly that *rentes*, even though declared *meubles* by law, are not subject to alienation by the tutor, and Duranton, tome 3, n° 543, affirms this principle. As a precaution against any possible mis-management of property by a tutor a *subrogé tuteur*, was appointed, and as sub-tutor, when the occasion arose, as in this case, he took the only means in his power to prevent the misapplication of the property by giving the bank notice not to make the transfer of the shares. In fact, that notice was equivalent to what is known in England as a distringas. It is said that the exact power and office of a sub-tutor is not very distinctly laid down in the french authorities. His duty appears to be to watch the tutor, and interfere when necessary. His power is simply negative, but the minor and third parties look to him to warn them. Ferrière, *Dictionnaire de droit*, 1771. Although it is contended by the Appellant's counsel, that the alienation by the tutor does not affect the transferees, we insist, however, that the alienation is *nulle de plein droit*, absolutely null and void, and the ward entitled to be put in the same position as if no transfers had ever been made, *Voet*, Pandects, lib. 27, t. 9, sec. 9, who is an express authority upon this point, says: *Quod si in rebus, non nisi ex decreto alienandis, decreti solemnitas non fuerit adhibita, ipso jure nullum plerumque est, quiquid gestum fuit.*. Ferrière, *Traité des tutelles*, part iv. p. 227, asserts the nullity of an authorized sale under, these circumstances. Meslé, tome 1, pp. 145, 209; ib. tome 2, p. 35; Magnin, tome 2, n° 1095; Solon, *Théorie de la nullité*, tome 1, p. 42, n° 75, also adopt this principle of the old french law. Lastly. It is contended by the Appellants that the Respondents are estopped by the judgment obtained against the tutor The answer to that is, first, that this objection has not been pleaded in bar to the action; and secondly, that there is no evidence that the bank shares in question were included in that judgment. By the canadian law Respondents had two remedies, and they are entitled to avail themselves of both, as has been done; but the conclusive answer to this objection is, that the present suit was commenced before the judgment was obtained, consequently there could be no estoppel; as there could not be *res judicata*.

MR. CHARLES E. POLLOCK, in reply: insisted, that the tutor was the proper person to require the transfers, and that the

bank was bound to transfer the shares as his requisition. That the contention of Respondents, that the value of the property, and not its nature, was to decide the question as to the tutor's power of alienation, was opposed to the principle of the law in Lower Canada and insupported by authority.

Judgment was delivered by the Master of the ROLLS.

The appeal in this case involves a question of considerable importance as to the extent of the authority of a tutor over the property of his ward according to the law of Lower Canada, which is the old French law. The Respondent, Dame Eleonore Simson, is the only child and sole heiress of her father, John Simson, who died in March, 1835; she was a posthumous child born in the month of August after the death of her father. On the 9th October, 1835, her mother was appointed her tutrix, and a gentleman of the name of Johu Fisher was appointed sub-tutor. On the 19th July, 1843, the mother of the Respondent married Charles Michel De Lisle, and they were in October following appointed joint tutor and tutrix of the Respondent. In November following the mother of the Respondent died, whereupon in December, 1844, the maternal grandmother was appointed tutrix. On the death of the grandmother, which took place in May, 1846, Robert Simson an uncle, was appointed sub-tutor, and Charles Michel De Lisle, the step-father, was appointed tutor of the Respondent. This appointment was made on the 27th May, 1846, and in such a manner as not to interfere with or abrogate the appointment previously made of Robert Simson as sub-tutor. Part of the property of the infant, derived from her father, consisted of thirty shares in the Bank of Montreal. Robert Simson on the 29 September, 1846, in his character of sub-tutor, gave a notice in writing to the bank, through its cashier, informing them tha tC. Michel DeLisle had no power nor authority to sell these shares. Notwithstanding this notification C. Michel DeLisle sold six of the shares in December, 1848; two more in January, 1849; ten more in June following; and the remaining twelve in the following month of September, 1849. In all these cases the Bank of Montreal made the transfer of these shares in the books of the bank, as required by DeLisle, out of the name of the father of Respondent, in whose name they were standing, into the name of the various purchasers to whom DeLisle had sold them. The question in this appeal is the validity of these transfers. The Respondent in 1855, married her present husband Mr. Turner, who is also a Respondent. In September, 1857, about a year after she attained her majority, and being by her marriage contract solely entitled to the property derived from her father she instituted original proceedings against the Bank of Montreal in the Superior Court of Lower Canada, claiming the dividends

which had accrued due on the thirty shares from the time of their sale in December, 1848, and in January, June and September, 1849. The sole question in the cause was whether the transfer of the shares was valid and effectual. The case was fully argued before the Superior Court of Montreal on the 30th of November, 1859, when the court pronounced a judgment in favor of Respondent, holding that the power of the tutor did not extend to the sale of the shares, and that the transfer of them by the tutor was null and void. The Bank of Montreal appealed from this judgment, to the Court of Queen's Bench in Canada, and the case was argued in March, 1860, and judgment given on the 31st May, 1860, by a majority of the judges affirming the decision of the court below, and dismissing the appeal with costs. The correctness of this decision is the question before us. The facts are not in dispute, and the question to be determined is the extent of the authority of a tutor over the property of his ward ; whether that authority extended to selling the bank shares in question ; and, if it did not so extend, whether the act can be considered as void in itself or only voidable. For the purpose of determining this question it is necessary to ascertain what the law of France was in this respect prior to the great French Revolution, which is the law which now obtains in Lower Canada. This law is the old Civil Law as applicable to this subject, regulated, nevertheless, by article 102 of the Ordonnance of Orleans, promulgated in January, 1560, during the reign of Charles IX and which notified to some extent in this respect the Civil Law which had previously prevailed on this subject, The general power of the tutor over the ward and his property was that of a parent " domini loco habetur," he could get in the property of the minor and give a discharge for payment of debts due to him ; in all matters relating to the tutelage, the act of the tutor bound the minor. The power of the tutor to dispose of the property of the minor was originally by the Civil Law unlimited, unless accompanied by fraud ; and in some cases he was compulsorily required to realize by sale all property that might by possibility suffer by being kept, such as houses, lest they should be burnt. This general power was limited, first by the law of Alexander Severus, which forbade the sale of " prædia " belonging to the ward, and afterwards by the Edict of Constantine, which prohibited the sale not merely of " prædia " without judicial authority, but even the sale of any other property of the minor, unless such as was liable to perish by use, and also the superfluous animals. And this was the law obtaining in France in the earlier part of the sixteenth century, when it was further regulated by the Ordonnance of Orleans in January, 1560, by which, in Article

102, it is enacted that tutors and curators shall be bound, as soon as they have made an inventory of the property of their wards, to sell "*par autorité de justice*" the perishable moveables, and to lay out the produce under the advice of relations and friends, in the purchase of "*rentes ou héritages*," that is, in the purchase of property producing a permanent income. It is to be observed, therefore, that the Ordonnance of Orleans recognize the law then subsisting in France in this matter to be regulated by the Edict of Constantine, which prohibits the sale of any property of the minor except those moveables which perish by use and the superflous animals; and then, in order to extend the power of sale of the tutor not merely over such moveables as are within the class specified by the Edict of Constantine, but also over those which are liable to decay or risk from other causes, enacts that the tutor shall have power to sell all "meubles périssables," but these only under the authority of the law (par autorité de justice). By "meubles périssables," as distinguished from moveables which perish by use, we understand to be meant all property which is liable to deteriorate from permanent causes. It is obvious that an Ordonnance which declares that, for the sale of perishable property of a moveable character, the sanction of a court of justice shall be required, infers that moveable property which is of a permanent character and producing a permanent income, cannot be disposed of without such authority. The effect and extent of the Ordonnance of Orleans on the power of the tutor over the property of his ward has been the subject of much discussion by the writers and jurists versed in French law, and has also been the subject of many judicial decisions, several of which have been cited and commented upon in their works. After carefully examining the various authorities and the writers on this subject prior to the enactment of the French Codes, and testing their opinion by the decided cases cited in their works, we are of opinion, though various passages may be found dispersed through their writings on which arguments may reasonably be founded leading to opposite conclusions, that no considerable or irreconcileable diversity of opinion appears to exist between them, and that the result of the law so far as it is applicable to the case before us may be thus stated: The tutor's duty is to make an inventory of all the property of his ward, and to take an administrative care in the protection and management of it; but without the sanction of a Court of Justice having been previously obtained his power does not extend to selling any portion of the immoveable property of his ward, or any portion of that property which is of mixed character; and further that his power is also restricted from selling any portion

of the moveable property of the ward without intervention and previous sanction of a Court of Justice having been first obtained, except such portion of it as is unproductive of revenue, and such portion as being also of a perishable character will necessarily either cease to exist or will from permanent causes become deteriorated in value at the period of time when the ward shall attain his majority; and even this qualified power of disposing of property of an unproductive character is still further limited by a restriction from disposing of articles in the nature of heir-looms, as to which an hereditary *pretium affectionis* is attached. Although this is an incomplete statement of the law, it is, we think, accurate and sufficiently comprehensive for the purpose of this case. It has been contended on behalf of the Appellant, that as in the Civil Law the original principle was that the tutor stood in the place of the father, and was *dominus* of the property of the ward and, as such, had power to dispose of all his property the case must be considered as one in which the burthen of proof lies on the Respondents to establish that the property in question falls within the range of the various classes of property which, by regulations made subsequent to the original law, should be excepted from the general rule which gave the tutor complete control: these exceptions, it is said, were of three sorts: first, immoveable property, and next, *quasi* immoveable property, which was called "immeubles fictifs;" and, thirdly, moveable property of a peculiar value as possessing a *pretium affectionis*, and being in the nature of heirlooms: that these were the only three classes of property excepted from the control of the tutor. That all property not falling within one of these three classes is still subject to the general control of the tutor, and that bank-shares do not fall within the description of any one of these classes of property, and consequently, that the power of the tutor over them was absolute and the right of the Respondent to recover them gone. But this is not the view we take of this case: we think that the Edict of Constantine changed the law on this subject, and exempted all property of the ward from the saleable control of the tutor, with the exception of the property there mentioned, and that, if the matter had remained as fixed by that Edict, such must be considered to have been the law of France prior to the year 1560. And we also think that the Ordonnance of Orleans has only altered the law in this respect by extending the power of sale by the tutor over the moveable property of the ward there specified, and this only with the previously obtained sanction of a Court of Justice. Although the various authorities cited to us are susceptible of various meanings and without some qualification of the generality of their terms are

not entirely reconcileable. yet this is, we think, the general effect of them; and this view is confirmed by the cases cited and commented upon in such authorities; as an instance of which one case which was cited before us may be referred to, where an office belonging to the ward, which had during the vacancy caused by the death of her father lapsed to the profit of the State, had been disposed of by the widow as the guardian of her daughter, the sale was annulled on the ground that the office was in the nature of "immeuble fictif." But the case proceeds to say: "Il en serait de même s'il s'agissait d'une chose purement mobiliaire, mais d'une grande valeur, et qui formerait, pour ainsi dire, toute ou la majeure partie de la succession." If this be the correct view of the case, the burden of the proof falls on the Appellants to show that the Bank shares fell within the property which De Lisle, as tutor, was entitled to dispose of without the sanction of a Court of Justice. It is always to be borne in mind that, as the wants and exigencies of society increase, new denominations of property will come into existence, to which the observations made and rules laid down in previous cases do not precisely apply, but we entertain no doubt upon a full review of this subject, that the Bank shares in question do not fall within any class of property which the tutor has power to dispose of without the sanction of a Court of Justice. It was not, in our opinion, open to the tutor to speculate upon, or to decide for himself or for his ward, whether such shares as these were likely to raise or fall in value. We think that no distinction can be taken in this respect, and so far as the power of the tutor is concerned between the shares in the Montreal Bank and shares in the Company of the Bank of England, and stock in the english or foreign funds, and that the sale and realization of such property requires the interposition and sanction of a Court of Justice, and the re-investment of the proceeds in property producing a permanent income according to the terms of the Ordonnance of Orleans. It has also been argued before us that the power of the tutor is by all the authorities held to include administration, and that administration necessarily includes sale. But we dissent from that argument; we think that the supposition that the administration of the affairs of a ward necessarily involves the sale of any portion of his property, is one derived from the ideas which in England attach to the word "administration," which in its technical sense applies only to a legal personal representative; but this is, in our opinion, wholly distinct from the functions of a tutor, and which, in order to avoid confusion, it is essential to keep distinct. Administration, as applicable to a tutor, includes management, but does not include sale, unless to the

limited and qualified extent already pointed out. It is partly for this reason that we have not thought it necessary or desirable to comment on the authorities cited from the decisions of the english tribunals, and the arguments deduced from them: they have not, in our opinion, any relevancy to the matter to be decided in this case. Neither have we thought it of any moment to consider the Articles in the present French Code, or the discussions in the Conferences which took place when that Code was framed, except so far as these Conferences illustrate any ambiguous point in the earlier law which up to that time obtained in the Kingdom of France. So far as these latter have any bearing on the subject; they concur in bringing us to the conclusion already stated, that by the law of France prior to that period and which is that now in force in the Province of Lower Canada, it was not in the power of the tutor to sell the Bank shares without the assistance and sanction of a Court of Justice. The next question to be considered is the effect of the sale which has actually taken place and the transfer of these shares to persons who are strangers to the record. It is argued by the Counsel for the Appellant, even on the assumption that the tutor exceeded his autority, still that the sale was good; and that, assuming that the transfer ought not to have been made, still that being made, it is valid, and that the act can only be treated as a voidable transaction, and not as one actually void, and that, if it be only voidable, the persons who bought the shares, and in whose names they now stand, ought to have been brought before the Court to answer to a matter in which they were so materially interested. We are of opinion, however, that the act of the tutor exceeding the limits of his power and the scope of his authority is actually void. The authorities on this subject, amongst the authors cited to us, are conclusive on this head. It is not necessary to refer to them in detail, but it may be useful to refer to one passage, where the principle which governs them and the reasons for it appear to us to be well and lucidly stated by Pothier, in his "*Traité de Personnes*," Part. 1, titre 6, article 3, section 2. After stating in this passage that a minor can, after his minority is over, reclaim immoveable property sold by the tutor, Pothier observes that he can do so without having "besoin pour cela de lettres de rescision; car on n'a besoin de ces lettres que pour revenir contre son propre fait. Un mineur a besoin de lettres contre le fait de son tuteur, parce que le fait de son tuteur est censé son propre fait; mais cette règle n'a lieu qu'à l'égard des choses renfermées dans le pouvoir d'un tuteur c'est-à-dire, qui concernent l'administration du tuteur. Or, cette vente faite par le tuteur, étant une

chose qui excède les bornes du pouvoir du tuteur, n'est pas plus à cet égard le fait du mineur que ne le serait le fait d'un étranger qui se serait avisé de vendre cet immeuble. Le mineur n'a donc pas plus besoin de lettres pour revendiquer cet immeuble, que s'il avait été vendu par un étranger sans caractère ; et le tuteur lui-même dans les choses qui excèdent son pouvoir doit être regardé sans caractère." This passage, besides bearing on the point now considering, is useful also as pointing out that in the sense in which the word "administration" was employed by the French Jurists on this subject, it did not include in it the idea of sale, which is derived from our English notions on this subject. The observations just read are made, it is true, by Pothier with relation to the sale of immoveable property, but the principle is the same with respect to all property sold by the tutor which he had no power to sell, and which the authority of a Court of Justice could alone entitle him to dispose of. When this excess of power is once established, then the sale is in fact the sale of a stranger, andthe act here complained of is as if a stranger had sold these shares, and had then by fraud or forgery, induced the Bank to make the transfer of them in their books. In that case they would still remain liable to the rights of the minor, both for the shares themselves and for the dividends which accrued on them. Though it cannot, in our opinion, affect the ultimate decision of the case, which must rest on the principles already stated, it is not an immaterial circumstance in the consideration of this case, that the sub-tutor, Robert Simson, on the 29th of September, 1846, a year and a-half before the first sale of shares took place, gave regular and formal notice to the Bank that Delisle, the tutor, had no authority to sell the shares, and that the circumstances of the ward were such that the disposal of them was not required for her benefit. The distressed circumstances of Delisle seem also to have been notorious and likely to be known to the Bank, in which case it was probable that any sale by him would be for his own sole advantage. The functions and duties of the sub-tutor seem to be not very clearly defined ; he has no power of actively interfering, but his duty seems to be to watch over the conduct of the tutor, and endeavor to prevent injury being inflicted on the person or property of the ward. Nothing could be more formal or precise than the notice served by him on the Bank in that character ; and as the Bank have thought fit, on their own determination, without even giving notice to the sub-tutor, or to the friends of the minor, of the attempt the tutor was making to sell his ward's property, to allow the transfer in their books of all these shares by the tutor to mere

strangers, they must now take the consequences, their Lordships being of opinion that the act of making that transfer was, so far as regards the minor, merely nominal, that it took away no property from her, and that the decision of the Superior Court of Lower Canada and of the Court of Queen's Bench is correct, and must be affirmed, with costs; and they will humbly advise Her Majesty accordingly. (5 *J.*, p. 169; 11 *D. T. B. C.*, p. 377; 6 *J.*, p. 1 et 14 Moore's *P. C. Rep.*, p. 417.)

ASSURANCE AGAINST FIRE.—WARRANTY.—PROCEDURE.

PRIVY COUNCIL, 1st July, 1862.

Présent: The Right Hon. LORD KINGSDOWN, The Right Hon. DR LUSHINGTON, and The Right Hon. Sir EDWARD RYAN.

ON APPEAL from the COURT of QUEEN'S BENCH, Lower-Canada.

BENJAMIN GRANT, Appellant, and THE ÆTNA INSURANCE COMPANY, Respondents.

A Policy assurance effected in July, 1858, against fire for twelve months, on a steamship, described in the Policy as "now lying in Tates' Dock, Montreal, and intended to navigate the St Lawrence and Lakes from Hamilton to Quebec, principally as a freight-boat, and to be laid up for the winter in a place approved by the Company." The ship never left the dock after the insurance was effected, and was destroyed by fire in June 1859; *Held:* That as there was evidence of a reasonable and *bonâ fide* intention on the part of the insured to comply with the conditions of the Policy, the Policy was not avoided by the fact that the steamer never left the Dock, as the above clause in the Policy contained no contract or warranty that the ship should navigate as therein described.

This Court is always indisposed to interfere with the judgment of a Colonial Court upon a question of form and practice, which differs in many respects from that which prevails in England.

Whether it is competent for a Defendant by the practice of the Courts in Lower Canada to move for a verdict *non obstante veredicto.* — QUÆRY.

By a Policy of Insurance, dated the 30th of July, 1858, Respondents, the Ætna Insurance Company, agreed to insure Appellant against loss or damage by fire, to the amount of 4,000 dols., the steamboat "Malakoff," of which he was owner. The policy described the vessel as the steamboat "Malakoff," now lying in Tates' Dock, Montreal and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec, principally as a freight-boat, and to be laid up for the winter in a place approved by this Company." On the 25rd of June, 1859, the Malakoff was destroyed by fire in Tates' Dock, from which she had never been

removed since the policy of the Ætna Insurance Company was entered into. The company having refused to pay the amount of the policy, Appellant, on the 7th of October, 1859, brought an action against them to recover the sum so insured by him. The declaration set out the policy of Insurance, the destruction by fire of the steamer, and averred that Appellant had sustained damage and loss exceeding the sum insured to the amount of $4,000; that he had fully complied with and observed all the conditions and stipulations binding on him under the policy, but that Respondents refused to comply with the conditions and stipulations in the policy or to pay Appellant the 4,000 dollars. Respondents first demurred to the declaration, as it did not show that the company were duly incorporated by the law of the state of Connecticut, or that they had authority to make contracts within or beyond the limits of that state. This demurrer was overruled. They also pleaded several pleas, and amongst others, by the third plea, that it was by the policy of insurance stipulated and agreed, as an essential condition, and without which the insurance would not have been effected by Respondents, that the Malakoff was to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, during the seasons of navigation, whilst the policy should remain in force. That the steamer was not at the time when the policy was effected in a condition to navigate at all, and that Plaintiff, well knowing the condition of the steamer, obtained the policy by fraudulently representing to Defendants that the steamer would and should navigate as aforesaid, and be laid up for the winter in a place to be approved by Defendants, and that Plaintiff never complied with the condition or warranty, and that the steamer never was in a condition to navigate, as by the policy conditioned. The other pleas alleged in effect, that the value of the steamer had been greatly exagerated; and finally the plea *défense au fond en fait* put in issue all the material averments in the declaration. Issue was taken upon these pleas by Appellant; and afterwards, in pursuance of the Lower Canada statute, 14th and 15th Vict., ch. 89, sec. 4, regulating trials by jury in Lower Canada, articulations or statements of facts to be proved were respectively filed by Appellant and Respondents. The action was tried before Mr. Justice SMITH and a special jury. Evidence was gone into as to the *bona fides* of Appellant's intention to navigate as stated in the policy and also as to the value of the steamer. The judge, in charging the jury upon the issues submitted to them, directed them that the policy contained no warranty or undertaking that the Malakoff should navigate as contended for by Respondents, and further, that the

words in the policy," intended to navigate," were merely a statement of an intention to do so, and not obligatory on Appellant, but rather a permission. As to the value of the Malakoff at the time of the loss, the judge directed the jury to decide according to the intrinsic value, which he told them was to be made out from the evidence of a witness named Meritt, and of the engineers who were called to prove the cost price of the steamer and machinery, and that the actual cash value of the steamer was not to be established by proof of what she was sold for at that time; and he further told the jury to consider that it was one of the stipulations binding upon Respondents that they might rebuild the steamer or pay the money that would rebuild. The jury, thus directed by the judge, gave answers to the several questions contained in the articulation of facts submitted to them, of which following were the material ones: Fifth " has Plaintiff complied with the conditions of the policy; and if not, what condition or conditions have not been complied with by him ?" Answer: " He has complied." Eight: " Were the said steamer and subjects insured exposed to greater risk and danger from fire in Tates' dry dock than if she had been navigating in conformity with the laws of this province respecting steamboats and steamboat inspection ?" Answer " No." Eleventh: Did Plaintiff, prior to the issuing of the policy, declare or represent to Defendants that the steamer " Malakoff," would and should navigate as aforesaid, and be laid up for the winter in a place to be approved by the Defendants; and was the said representation material, and was it complied with ? Answer " No." ; he conformed to the conditions of the policy." Twelfth: " Did Plaintiff, when applying for the insurance, conceal from Defendants the facts that the hull of the "Malakoff" was and had been the hull of the old steamer " North America " ; and was that fact material ?" Answer: " No." Thirteen: " Do you find for Plaintiff or Defendants: and if for Plaintiff, for what amount ?" Answer: "For Plaintiff, £1,000, less £100, being one third of the value of the remains." Respondents afterwards made three separate motions to the Superior Court. First, in arrest of judgment, on the ground of the findings of the jury to the question being incomplete and inconsistent with one another. Second, for a new trial, on the grounds, among others, that the judge, at the trial, erroneously admitted as evidence certain letters of one Wood to his principals, the Respondents, and allowed the same to be read to the jury, and received as evidence of the facts contained in them; that the judge erroneously excluded evidence of contemporaneous representations made by the Appellant to the first underwriters upon the steamer " Malakoff," namely, to the Equitable Insurance Company, and

refused to allow Respondents to cross-examine Tate with respect to such representations; that the Judge erroneously instructed the Jury that the Policy contained no warranty that the "Malakoff" would navigate the St. Lawrence as a freight-boat, and that no material representations which had afterwards been uncomplied with had been made by Appellant; and that he had erroneously charged the Jury as to the manner in which they were to estimate the value of the steamer. Third, for judgment, "*non obstante veredicto*," on the ground of non-compliance with an expressed condition and warranty contained in the Policy, that the steamer would and should navigate the St. Lawrence and the Lakes principally as a freight-boat during the season of navigation, and while the Policy should remain in force, the non-compliance with which was admitted by the Appellant. The parties having been heard upon these motions, Mr Justice BADGLEY, on the 31st of March, 1860, delivered the judgment of the Court, dismissing Respondent's motion in arrest of judgment, but granting the motion for judgment *non obstante veredicto*, on the ground that the Policy did contain a warranty that the "Malakoff" should and would navigate as aforesaid, which warranty was not complied with, and dismissed Appellant's action and demand, with costs; but making no Order in respect of Respondent's motion for a new trial.

BADGLEY, J., in rendering judgment, said: "Three motions have been submitted in this cause, the first in arrest of judgment, the second for entry of judgment for Defendants, *non obstante veredicto*, and the third for a new trial, all predicated upon a verdict found in Plaintiff's favour, upon his action against Defendants for the recovery of $4000, on an open policy of insurance effected with Defendants, upon portions of the late steamer Malakoff. The motions are severally based upon special grounds detailed in the respective motions, and will be adverted to particularly in the course of my observations. The contract of insurance between the parties is in the following terms and conditions contained in Defendants' policy: Defendants agreed to insure Plaintiff "for $4000, namely, $2400 on "the hull and cabins, $1200 on the engines and boilers, and "$400 on the tackle and furniture of the steamboat Malakoff, "now lying in Tate's Dock, Montreal, and intended to navigate "the St. Lawrence and Lakes from Hamilton to Quebec, "principally as a freight boat, and to be laid up for the winter "in a place approved by this Company, who will not be liable "for explosions either by steam or gunpowder. The company "agree to make good to the insured any loss or damage, not "exceeding in amount the sum insured, as shall happen by "fire to the property as above specified, from the 30th of

" July, 1858, to the 30th of July, 1859, the said loss or damage " to be estimated according to the true and actual cash value " of the property at the time the same shall happen." The other stipulations were those generally contained in policies: namely the exemption of the Defendants from liability for loss occasioned by civil commotion, &c.: the avoidance of the policy for want of notice to the Defendants and of indorsement on their policy of any other insurance effected by the insured on the same subjects; in case of other insurances, the Defendants' liability only for such sum as their insurance should bear to the whole amount insured on the said property; and the acceptance of the policy subject to the printed conditions annexed thereto. It is proper to state that two other insurances were also effected by the Plaintiff, the first with the Equitable Office for $2,400 on the hull and cabins, and $1,600 on the engines and boilers, together $4000, of the said steamboat Malakoff, and the other with Home Office for £1000, to wit, $2,400 on the hull and cabins, $1,200 on the engines and boilers, and $400 on the tackle and furniture of the said steamboat, making the total insurance £3000, distributed as follows: £1,800 on the hull and cabins, £1000 on the engines and boilers, and £200 on the tackle and furniture of the Malakoff. Of these Defendants had $\frac{1}{3}$ of the first, $\frac{3}{10}$ of the second and $\frac{1}{2}$ of the third. The insurance with the Equitable is noted in the Defendants' policy, and it is admitted that they had notice of that effected with the Home Office. It only remains to add that all these policies were open policies, without special valuation of the subjects insured by them. The verdict was found upon special issues; articulations of facts, as follows: 1° The Defendants' execution of the policy; 2° The destruction by fire of *nearly all* the subjects insured, except the bottom of the vessel and the remains of the engines and boilers; 3° The Plaintiff's ownership and his loss of £3,000; 4° Namely, £1,800 on hull and cabins, £900 on engines and boilers, and £300 on furniture and tackle, with estimate of the remains worth as old iron, £300; 5° Plaintiff's compliance with terms of the policy; 6° The fitness and proper condition, or nearly so, of the Malakoff to navigate at the date of the policy, but that she had not navigated; 7° That she was in running order at that date; 8° That there was no greater risk in the Dock than if navigating; 9° That she was put in order and required no further outlay; 10° The Defendant's knowledge of other insurance effected; 12° Absence of concealment by Plaintiff from Defendants of the sameness of the hull of the Malakoff with that of old steamer North America, and the immateriality of that fact; and 13° The finding for Plaintiff of the sum demanded, £1000, less £100 for $\frac{1}{3}$ of the value of the remains.

The 11th finding is peculiar; the special issue inquires: "Did Plaintiff declare or represent to the Defendants that the Malakoff would and should navigate, as aforesaid, and be laid up for the winter in a place to be approved by the Defendants, and was the said representation material, and was it complied with?" The finding is, "No, he conformed to the conditions of the policy." The contract and findings having been stated, the motions under discussion will be examined; 1st, that an arrest of judgment is grounded upon the irregularity and inconsistency of the findings generally, and the failure of the jury to answer several of the articulations of fact submitted, and specially the 3rd and 4th, and the consequent impossibility to make up a judgment in Plaintiff's favour. In my view of the case the 11th articulation was not matter for the jury at all, being part of the contract itself, and forming part of the policy. The subject matter could not be affected by evidence of fact upon which the Jury could legally pass; but, as it was submitted to them, they should have given a sensible and applicable finding; but as it stands the finding is no answer to the special issue. The Defendants' general objection to the other findings, and particularly to those to the 3rd and 4th special issues, cannot be sustained; and, inasmuch as the 11th as above, should not have been submitted, and the other findings are not apparently objectionable, the motion in arrest of judgment upon the grounds stated will be rejected. The second motion to enter up judgment for the Defendants, *non obstante*, and the third for a new trial, will be considered together; and, to get rid of a little written superabundance, the grounds which require least remark will be taken up first, and these are among the number set out in the third motion that for a new trial, which object to the rulings of the judge at the trial, in his alleged admission of illegal and rejection of legal testimony, misdirections in law, and erroneous instructions upon the evidence and points submitted. Now, of these, the 5th and 6th objections are untenable; they refer to the rulings as to the proof of ownership in the Plaintiff by the customs certificate and other proof adduced. But these do show both title and possession in him; his interest in the subjects insured is satisfied by the pooof adduced, and that proof is uncontradicted. The Plaintiff appears, therefore, as the registered owner of the Malakoff under the public document, and as in possession of her at the time the insurance was affected, as well as at the time of the accident. 1st, Taylor, *on Evidence*, p. 126, says, that "in an action on a policy of insurance of a "ship and her cargo, the Plaintiff may rely on the mere fact "of possession, without the aid of any documentary proof or "title deeds, unless rendered necessary by the adduction of

" contrary evidence." The 10th objection, of concealment and its materiality, is likewise untenable. Whether the hull of the Malakoff was or was not that of the North America was unimportant in an insurance against fire: it might have been otherwise in a purely marine risk, inasmuch as in this latter case the unseaworthiness or incapacity to perform the voyage would have given operation to the implied obligation upon the assured of not concealing something important within his own knowledge, and any loss or damage would, therefore, have fallen upon the insured himself. The fact in evidence, however, in this respect is satisfactory, inasmuch as the old hull had been almost altogether renewed at the time of the insurance, when indeed the Malakoff had become a strong serviceable steamer. Moreover, this implied obligation relieves the insured from volunteering such spontaneous information (1) however material it might be under other circumstances, although it is quite true that the insured would have been held to disclose all he knew had the information been particularly demanded of him by the insurers. So far from this being the case the latter waived the inquiry, and forestalled the information about the Malakoff by reference to documents in possession of Defendants' agent. The jury found the fact not to be material, and their verdict in this respect will not be disturbed, 1st Arnould, Perkins Edition, No. 570. The 11th objection has been already mentioned, and the very general and unimportant ground contained in the 12th, 15th, 16th, 17th, 18th, 19th, 20th and 21st objections need not be dwelt upon, nor prevent an immediate reference to the really important objections contained in the 1st, 2nd, 3rd, 4th, 7th, 8th, 9th, 13th and 14th grounds. The four first of these have reference to the admission of illegal and the rejection of legal evidence: Nos. 1 and 2 refer to the former; Nos. 3 and 4 to the latter. As to the admission of illegal evidence it appears that Wood, Defendants' agent, who had taken the risk, was examined by Plaintiff as his witness, and with the purpose of negativing the warranty contained in the policy pleaded by Defendants, the witness was compelled to produce to the jury certain private letters and reports to his foreign principals from himself as their agent, but written after the loss had occurred. This evidence is not legal, and the requisition to produce it is not warranted by law. The general principle cited arguendo by Plaintiff's Counsel, from Paley, on Agency, 322, and 1st Taylor, § 539 and page 755, is undoubtedly correct, " that no agents, however confidentially employed, are privileged from disclosing the secrets of their principal, except

(1) 1st Arnould, Perkins Edition, Nos 567, 568.

counsel and attorneys." The limitation of the general principle is also stated by them who echo the unanimous opinions of text writers and of judicial decisions, that the generality of the rule does not apply to such circumstances as the present. From the leading case of FAIRLIE vs. HASTINGS, decided by Sir William Grant, Master of the Rolls, Paley, 269, to be found in 10 *Ves., Jr.*, p. 123, to the present time, no difference of opinion exists. He lays it down as a general proposition of law, that what one man says not upon oath cannot be evidence against another man. The exception must arise out of some peculiarity of situation coupled with the declaration. An agent may undoubtedly, within the scope of his authority, bind his principal by his agreement and in many cases by his acts. What the agent has said may be what constitutes the agreement of his principal, or the representations and statements made may be the foundation of or the inducement to the agreement. Therefore, if writing be not necessary by law, evidence must be admitted to prove that the agent did make that statement or representation. So with regard to acts done, the words with which those are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act must be affected by the words. But except in one or other of those ways, he observes, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of a fact cannot be proof of it, though it may have some relation of the business in which the person making that assertion was employed as agent. The admission of the agent cannot be assimilated to that of the principal. A party is bound by his own admission and is not permitted to controvert it. But it is impossible to say that a man is precluded from questioning or contradicting anything any person has asserted as to him, as to his contract or his agreement, merely because that person has been his agent. If any fact rest in the knowledge of an agent, it is to be proved by his testimony, not by his mere assertions. Lord Kenyon carried this so far "in 1 Esp. Cas 375, MASTERS vs. ABRAM, as to "refuse to permit a letter by an agent to be read to prove an "agreement by the principal, holding that the agent himself "must be examined. If the agreement were contained in the "letter, I should have thought it sufficient to have proved "that letter written by the agent; but, if the letter even "offered as proof of the contents of a pre-existing agreement, "it was properly rejected." See Taylor, § 539. The letter in this cited case, was in fact, subsequent to the contract. In the cases of 4 Taunt. Rep. p. 511 and 565, of LANGHORN vs. ALLNUTT, and KAHL vs. JANSEN, the Court of Common Pleas decided that the letters of an agent abroad to his principal, containing

a narrative of the transactions in which he has been employed, were not admissible in evidence against the principal as the mere representation of the agent, because they were not part of the *res gestæ*, but merely an account of them. See also REYNER vs. PEARSON, Ibid 662, where the general rule is this, when it is found that one is the agent of another, whatever the agent does, or says, or writes at the making of the contract as agent, is admissible in evidence against the principal; but what this agent says or writes afterwards is not admissible. So also 4 Rawl. 294, per Rogers, J.: HOUGH vs. DOYLE, so this same principle will be found in BETHAM vs. BENSON, Neil Gow's R. 45. Ch. J. Dallas there says it is not true that, when an agency is established, the declarations of the agent are admitted in evidence merely because they are his declarations; they are only evidence when they form part of the contract entered into by the agent on behalf of his principal, and in that single case they become admissible, these declarations, at a different time, have been decided not to be evidence; numerous english and american authorities may be cited in addition: a few will suffice: 1 B. and C., 473; 8 Bing, 471; 19 Pick, 220; 7 Cranch, 336; 2 Hill, 464; 3 Hill, 362. Considering these authorities as the true exponents of the law on this point, it follows that the evidence in question was not legal and should not have been submitted to the jury; it was not contemporaneous with the contract, not *dum fervet opus*. It may also be remarked that, as that evidence was intended to disprove the existence of a warranty written in the policy, its admission controverted another established rule of evidence, which prohibits the admissibility of parol or extrinsic evidence to contradict, vary, or control written contracts. Nos. 3 and 4 refer to the rejection of evidence offered. Defendant proposed to show, by the witnesses Tate and Lunn, that the insurance effected by Plaintiff with the first insurer, the Equitable Company, was accompanied by false and fraudulent misrepresentations at the time of making the insurance with that Company, as to the condition and circumstances of the Malakoff, and as to the stipulation of her navigating. The judge in limine stopped the question and prevented any answer from being given. As the ruling is reported, without stating the legal ground taken for it, the authority from 3 Kent Com., p. 284, cited by Plaintiff's counsel arguendo upon the motion may probably be the support, and is as follows: "This rule has not been favourably received by later judges, and it is strictly confined to representations made to the first underwriter, and not to intermediate ones. Nor does it extend to a subsequent underwriter on a different policy, though on the same vessel and against the same

risks." See, also, 2 Johns, 157. The facts in the evidence in relation to this ruling are as follows: Wood, the witness above spoken of, was the agent of the Ætna, Defendants, and of the Home Offices, and was applied to by Tate, Plaintiff's agent to ascertain the rate of insurance. Tate intimated to Wood his desire to effect insurance upon the Malakoff for £3000, to be distributed among three different offices for £1000 each. Having effected insurance on the 30th of July with the Equitable, he, on the following day the 31st, applied to Wood to complete his original purpose; stated his previous insurance with the Equitable and obtained from Wood insurance with Defendants for another £1000, as above, and with the Home Office for the third £1000. The original purpose and intention intimated to Wood, was in this way perfected, and the insurance with the Equitable was noted in Defendant's policy. In England, these insurances would, of course, have been effected with the underwriters by the usual slip process, showing the signature of the Equitable as first insurer, and those of Defendants and the Home Offices second and third insurers, and if there are any false or fraudulent representations made to the Equitable would avail to Defendants in resisting the claims against them. In *Barber* vs. *Fletcher*, Doug. 305, Lord Mansfield said: "It had been deter-"mined, in divers cases, that a representation to the first "underwriter extends to all the others." See, also other cases, "*Pearson* vs. *Watson*, Cowp. 785; *Stackpool* vs. *Simon*, Park, 932; Marsh, 772; *Tersé* vs. *Parkinson*, 4 Taunt. 440 and 849; *Forrester* vs. *Pigou*, 1 M. and S. 161; 3 East. 572; 2 Camp. 544." So also Phillips's commenting upon this rule, at n° 554, says: "The principle on which this rule rests is, that, "in offering to a party a policy subscribed by another, the "insured implies a proposal that the party to whom it is "offered shall enter into the same contract which that other "has entered into whose name is already upon it, unless such "presumption is rebutted by what passes between the parties "to the subsequent signature; and the contract will not be "the same if there are certain conditions between the parties "to the prior subscription which do not form a part of "the contract between those to the subsequent one. The rule "is usually stated, generally, that a representation to the first "underwriter is such to the others, and the meaning evidently "is, that the subsequent subscribers may avail themselves of "the rule in defence against a claim on the policy and this is "the result of the jurisprudence on this matter." The exigencies and necessities of trade in the extensive and busy marts of England, and the number and variety of insurance transaction that must be effected within short periods of

time, have established the system of slip certificates, by which each susbscriber in effect becomes an individual insurer, though on the same policy, and the usages of trade then come in and give effect to the separation ; hence it becomes necessary to recognize the influence of " such a rule, which is " grounded upon the reasonable presumption that the subse- " quent underwriters subscribe the policy from the confidence " reposed by them in the skill and judgment of him whose " name they see stand first in the policy and from their belief " that he had duly ascertained and weighed all the circums- " tances material to the risk." 1 Arnould, p. 531 ; 10 Pick, 402 ; 1 Peters, S. C., 186. It is true there are limitations to the rule, as " that it is strictly confined to those matters of " intelligence relating to the subject insured, with regard to " which it is reasonable to suppose that the first underwriter " would require information and without which it may be " presumed he would not have subscribed to the policy." The rule is also confined to the first underwriter, and to underwriters on the same policy. " It has never been extended, nor, indeed, is the presumption on which it rests made applicable, to under-writers on a second policy on the same interests and risks, *unless*, says Arnould, p. 537, perhaps, it could be clearly shown that the second policy was fraudulently obtained by the exhibiting of the first." Duer, 68-9 ; *Sibbald* vs. *Hall*, 2 Dow's P. C. 262. This latter remark shows that the rule is not altogether absolute against the admission of evidence to sustain fair dealing between the parties and resting authoritively upon the broad legal principle that fraud annuls contracts. 2 Duer, p. 573. The rule, with its restrictions and limitations of English decisions, is adopted as unquestionable, and Mr. Duer, with his usual perspicacity and learning observes : " In " the United States, although from the disuse, almost total, of " private underwriters, the application of the rule is now of " rare occurrence, its validity has been often recognised ; and " however strongly we may be disposed to question the suffi- " ciency of the reasons on which it was introduced, it stands " on too firm a basis of precedent and authority to be now " shaken. I confess my own adherence to the rule, on the " *ground of reason as well as of authority*. I regard the pre- " sumption on which it is founded as reasonable, sound and " practical. It springs from acute knowledge of men, and of the " usual mode in which business is conducted, and as will " appear hereafter, it is the very presumptions on which other " decisions, of which the propriety and wisdom have never " been doubted, are solely placed and can *alone* be vindicated." Now, this is made to rest upon presumptions only : how can such presumptions be reasonably refused their operations in

this case, under our legal system? The aggregate insurance, whereof that of Defendants was a part, was in effect one insurance, as originally contemplated and designed by Plaintiff; the influence of the insurance effected with the Equitable Company, as the first insurer, must have been felt by Defendants, and the benefit of Plaintiff's false and fraudulent misrepresentations to that first insurer, may not in reason be refused to Defendants under the circumstances of the case. It may be that the first policy may have been exhibited to Defendauts, or other facts adduced, showing that or other implications against Plaintiff; at all events false representations and fraud have been pleaded to this action, and the preventing of the introduction, *in limine*, of testimony tending to support these allegations and the rejection of the questions proposed to the witnesses Tate and Lunn, appear to have been at least premature and not consonant with law, the more so as our legal system is more enlarged than that from which we derive our commercial law, of evidence, because it partakes more of the Equity than the common law principles in practice in England. A casual remark upon the 9th objection, that all material representations had been made by Plaintiff to the insurer will suffice. It is quite true that all such matters are within the sole province of the Jury and not for the Judge to express his Judicial opinions upon them, and thereby in effect to substitute his opinions for their findings. It is undeniable that the Judge cannot pass either upon the existence or extent of misrepresentations put in issue as matters of fact. The same observations apply to the 11th objection as to fact of Plaintiff's concealment in relation to the hull of the Malakoff. It is not, however, meant to be asserted that judges are precluded from the expression of their opinions to juries upon facts submitted; but even then the latter are independent of such opinions, and themselves weigh the effect and importance of the evidence adduced. In a recent case, in England, in 40 eng. rep. p. 358, it was held that strong comments by the judge to the jury on facts of the case was no ground for a new trial: and Pollock, C. B., said: "I know of "no rule of morality which tells a judge that he is not to "make observations on the evidence in a cause. He may tell "the jury it is strong or weak, if really it is so. I can go "farther and say it is a dereliction of duty if he does not." 2 Duer, 396. As to concealment and its legal bearing upon the insurance, it may be observed that where there is entire good faith non disclosures are not to be deemed material simply that their communication might have excited suspicion in the insurer. Where there was no intention to deceive, but the non-disclo-

sure was withheld solely from the conviction of its unimportance, it should appear clearly, in order to avoid the policy, that the facts would have been deemed material by every prudent underwriter as really embracing the risk and justifying an increase of premium. The insured should not be required at the peril of his contract to anticipate all the suspicions that might arise in the mind of the insurer, by disclosing facts which he reasonably believes could have no effect in varying the risks he desired to cover. It is true that an erroneous belief will not protect him; but the error, wholly unmixed with fraud, that is to deprive him of an indemnity, ought to be conclusively established. The 13 and 14th objections refer to the ruling in the first instance, by which the decisions of the jury upon the value of the subjects was to be based on; *their intrinsic value to be made out from the evidence of Merritt and the engineers; and, in the second instance, that their value was to be the fair value at the time of the loss, unaffected by local circumstances or by other accidental causes of depreciation.* Defendants' evidence of the market price and sale of other steamboats similar or nearly so to the Malakoff, and at or about the time of the accident, as the policy criterion of the value of the Malakoff was rejected by the judge, who said that he could not accept Defendants' view of the law, who wished to estimate the value by bringing a steamboat into the market and selling her suddenly for cash. These rulings are not in conformity with the contract or with law. The stipulation in the policy, the binding contract between the parties, is, *that the loss or damage shall be estimated according to the true and actual cash value of the property at the time the loss shall happen.* What, then, is that cash value, and by what other fair mode of ascertainment can it be found than by its cash price in the market? Old Hudibras expounds the rule perfectly, "the value of a thing is what it will bring." It cannot be by taking the intrinsic cost of the subject, there can be no intrinsic value of such a thing, nor by separating the subject from the circumstances of time and place, which alone can give it a current value. If the destruction of the subject render it not available for appreciation by actual sale, its cash value may be found by ascertaining the price obtained in cash for like or nearly like subjects at the time. The abstraction of time and place from the estimation would make it impossible to know the cash or even the fair value or any thing, and especially of the subjects in this case at the given time of the contracts, as ruled in this case. The money value in the existing market is the only rule and guide to carry out the stipulation of the contract, and this rule is moreover supported by authority. 2 Philips, n° 1176, says: "Insurance

being a contract of indemnity, the underwriters are not liable to pay any loss except such as the assured has actually sustained. Whether the loss be total or partial, its amount cannot be ascertained without determining the value of the subject." In n° 1245 the author says : "The value of a building or of any article in a fire policy is what it could be sold for, since its value must be proved ; and it does not appear what other value than this could be satisfactorily shewn." He remarks that the obvious presumption is that the rule is the same in a fire policy as in a marine insurance, namely that the value of the subject at the beginning of the risk is referred to *where the policy by its provisions* or the description of the subject does not require a different construction. The authorities from Hammond and Ellis, cited to the jury rest upon the general rule of the value at the beginning of the risk, but do not apply to this and similar cases in which the policy contracts expressly for an exception ; the effect of the ruling would absolutely set aside the policy stipulation of the true and actual cash value at the time of the loss, and substitute for it either that of intrinsic value or the mere fair value at the time of the loss, independant of all circumstances regulating or applying to it. Angell, *On fire insurance*, §264, says, " that loss or damage " to goods is to be estimated according to the true and actual " value of the property at the time the loss happens," and cites a judgment in Louisiana, by which a fair sale at auction after notice to the insurers, may be considered by the jury in estimating the damage and ascertaining the indemnity. 1 Bell's *Com. on law of Scotland*, p. 643, says the loss is estimated on the destructible parts on the whole value of the house as it would have sold in the market, &c., and so, also, the french authorities are equally precise. See Boudousquié, p. 164." Mais que doit-on entendre par la juste valeur des choses ? Ce n'est ni la valeur de convenance, ni celle d'affection, ni même le prix d'achat, c'est la valeur vénale, c'est-à-dire le prix qu'on en pourrait retirer si on les mettait en vente. *Valere res dicitur quantum vendi potest.* Dans la règle le juste prix est celui auquel les choses de pareille nature et qualité sont vendues dans les mèmes lieux, dans le même temps, dans les mêmes circonstances et à toutes sortes de personnes sans avoir égard à la valeur extraordinaire, c'est-à-dire au prix qu'on peut obtenir en certain cas, et sous certains rapports. Le contrat d'assurance n'étant pas une mesure conservatoire des objets assurés mais seulement un contrat d'indemnité, &c. En un mot, l'assureur garantit l'assuré contre la perte réelle qui résulte de l'incendie : mais cette perte payée son obligation est éteinte. See also Grun and Joliat, p. 25 ; Persil, p. 90, n°s 71, 72. Emerigon, Meredith's *Translation*, cap. 9, § 1 ; and Gouget and Merger,

vbo. *Assurance maritime*, p. 365, who hold that the contract would be one against public policy and morality if the contrary doctrine were maintained. This policy, then, having expressly stipulated for the kind and time of valuation; any other judicial instruction to the jury upon the matter is not warranted, and hence the ruling and instruction as above are illegal. There only remains the questions of representation and warranty. The written words of the policy in connection with these points are as follows: after stating the particular amounts upon particular parts *of the steamer Malakoff now lying in Tate's Dock, Montreal, and intended to navigate the St. Lawrence and Lakes from Hamilton to Quebec principally as a freight boat, and to be laid up for the winter in a place approved of by this company, who will not be liable for explosions, either by steam, or gunpowder.* This statement must necessarily be subjected to legal construction to determine its nature, whether of representation or warranty. Then, as to its being a representation, the language is plain, simple and explicit, adverting to navigation during the season, the course of that navigation the principal manner of conducting it, and because of the date of the policy providing for laying up the steamer during the intermediate winter period between the open summer periods containing the winter. It is impossible for such language to require constructive explanation. But if it be a representation, testimony is admissable with reference to it, but to what purpose here, where it is in writing and in plain and clear phraseology? Angell, p. 194, condensing other authorities, remarks, "A "representation in the technical sense in which that term "bears to the law of insurance, and as distinguished from "warranty has been well defined, a verbal or written statement "made by the assured to the underwriter before the subscrip- "tion to the policy, as to the existence of some fact or state "of facts, tending to induce the underwriter more readily to "assume the risks, by diminishing the estimate he would other- "wise have formed of it." He elsewhere observes, "it is of "some matter intrinsic to the contract, and generally, if not "always, relates to the present state and condition of the "subject insured. The term in insurance, it has been considered "as in the nature of collateral contract either by writing, not "inserted in the policy, or by parol, and is a communication "of facts and circumstances relative to the insurance made by "the underwriters with the view to enable them to estimate "the risk and calculate the premiums to be paid." So also, 1 Arnould, 439; Ellis p. 30, c. 4. It is asserted that it is said to be material when it communicates any fact or circumstances which may be reasonably supposed to influence the judg-

" ment of the insurer in undertaking the risk or calculating
" the premium, and whatever may be the form of the expression
" used by the insured or his agent in making a representation
" of it, have the effect of imposing upon or misleading the
" underwriter, it will be material and fatal to the contract.
" There is a material difference between a representation and
" a warranty; the former being a part of the preliminary
" proceedings which propose the contract, and only a matter
" of collateral information on the subject of the insurance, and
" makes no part of the policy; the warranty is a part of the
" written contract, as it has been completed, and must appear
" on the face of it. The former may be substantiallv correct,
" but renders the contract void on the ground of fraud; the
" latter must be strictly and literally complied with, and non-
" compliance with it is an express breach. Fraud is an element
" which vitiates every contract, and a want of truth in a
" representation is fatal or not to the insurance, as it happens
" to be material or immaterial to the risk undertaken; but
" when a thing is warranted to be of a particular character or
" description, it must be exactly as it is represented to be,
" otherwise the policy is void and there is no contract. This
" may be considered as a first principle in the law of insurance."
These representations have been classed as positive representations of what is stated to be intended or expected or believed as a matter of fact to be made good by the assured, and will not affect the contract, though the fact prove otherwise, if the statement is made honestly and not fraudulently with intent to deceive the underwriter and draw him into a contract which he might decline. On the other hand, positive representations and affirmative and promissory, although the distinction is one more of form than substance, as in fact most positive representations, even when in terms affirmative are, in effect, promissory, and whenever it is a positive statement of the actual or evident existence of some fact material of the risk, it is only distinguishable in form from a warranty by not being on the face of it. At the trial the statement in the policy was assumed as a representation. and as such parol evidence was admitted in relation to it. That evidence clearly proved that Tate, the agent, did represent the Malakoff to be in Tate's Dock temporarily to repairs. and that when completed she would navigate between Hamilton and Quebec, principally as a freight boat, affirming the written statement on the policy. In spite of written and parol testimony, the jury find that Plaintiff made no such declaration or representation; the finding is manifestly contrary to clear evidence adduced by parol and is singularly contradictory to the written evidence of the statement afforded by the contract, thereby in opposition to a rule not of law

alone, but of common sense, that what is contained in the policy or other instruments upon it, purporting to belong to it, at the time of signing is part of the contract and is adopted by the signature. Both parol and written evidence concur with the result of the common sense and legal construction of the statement; representations must be construed by the same principles by which all other contracts in writing are expounded, in which the intention of the parties is always to be sought for in the instrument. In this statement Plaintiff's intention to navigate the Malakoff so soon as the repairs should be completed was understood by both parties, whilst it is equally manifest that no intention existed on Plaintiff's part that she should be kept in the dock during the entire insurance year; and the jury, moreover, find her at the date of the policy to be in running order. Whether this intention of navigation could be considered as influencing the insurer's estimate of the character and degree of the risk to be insured against is not doubtful, inasmuch as Wood swears positively that he would not have taken the risk at all had the intention existed to keep her in the dock. The finding of the jury upon this special point and its materiality is either negative or nonsense, to which no legal meaning can attach. Under all these circumstances of the judicial rulings and instructions, above advérted to, and the irregular and incorrect findings of the jury, the motion for a new trial has been sustained, and a new trial would unhesitatingly be ordered, did not the remaining motion, for the entering up judgment for the Defendants *non obstante veredicto*, urge its importance upon the court, because the final determination and judgment of the court mainly depends upon the subject matter of this motion. Although the same point is contained in the motion for a new trial, it appeared advisable to consider it in connection with the motion *non obstante*, as being its more legitimate position, free from minor technicalities or argumentation. The grounds taken in this motion are the special warranty and condition written in the policy, that the Malakoff should navigate, &c., and Plaintiff's non-compliance and breach with them, Malakoff having, in fact, never left the Dock from the time of affecting the insurance in question. The judicial ruling and instruction declared the statement to be merely permissive. Bearing in mind the express written statement in the policy it must be observed that the person who sought and obtained the insurance was himself the proprietor in possession of the Malakoff at the time of the insurance, and must himself have known what was to be done with the boat during the season of navigation; that being in dock for repairs, she was there to fit her for the only purpose for which she was originally

built, that of navigating; that having possession of the Malakoff he was not only open to an offer, but actually bargained for the hiring of her for navigation purposes without reference to Defendants. Moreover, why was the intention to navigate so particularly stated, specifying the line of voyage and business travel shat she was to follow; the manner of the business to be done principally as a freight boat; the stipulation that after her navigating done, she should be laid up in some place to be approved of by Defendants; finally, that Defendants should not be liable for explosions by steam, her usual mode of propulsion, or by gunpowder, which might possibly form part of her freight. Permission to navigate does not seem to form any ingredient of these stipulations; on the contrary, taking the contract in the fair and obvious import of words and equivalent to an express statement of all the inferences naturally and necessarily arising from it, a positive promissory representation becomes plainly manifest, which it is proved had not been complied with, and the contract has, therefore, been rendered inoperative. It must be remembered that the statement is not a mere verbal representation extrinsic and collateral to the contract, mere verbal explanation previous to the contract, but, on the contrary, that it forms part of the contract itself, and that as a Court of Law will only construe not reform a policy, the construction adverted to above in the discussion of the question of representation gives to the written statement the significant character of a warranty. Now Philips, *on Insurance*, No 554, says, "it is law "that promissory representations of material facts made and "referred to in the policy usually have the effect of express "warranties and come under that head." Arnould, p. 490, says, "that the same statement indeed whilst when made ver-"bally or in writing *distinct from the policy* by the broker "to the insurer is constructed as a posivite representation and "would if written in the face of the policy in almost all cases "amount to warranty, the insertion in the policy causing it "to be so construed," and Ellis, p. 39, says, "it is the practice "of most offices to insert the statement or representations "made at the time of affecting the insurance on the body of "the policy. By this means they become a warranty and pre-"vent questions from arising on the subject of the materiality "or immateriality of the statements." In this case the statement being written on the policy, it is for the Court to decide upon its legal bearing as a warranty and condition, and upon the general effect of its non-fulfilment upon the rights and remedies of the party in fault. The provinces of court and jury are plainly distinct, here the Court decides upon the sense and constructions of the common words and phrases, of the language

where no peculiar meaning is proved. Arnould, p. 142, says, " a warranty in a policy of insurance in whatever form created " is a condition or contingency and unless performed there is no " contract. It is styled a condition precedent which means " that is is perfectly immaterial for what purpose the war- " ranty is introduced, and that no contract exists unless the warranty be literally complied with." Any direct or even incidental allegation of a fact relating to a risk has been held to constitute a warranty. " It is simply sufficient and ought to be sufficient," observed Lord St. Leonards, " to avoid the policy that only one thing warranted is not true." In this case the stipulation undertakes for the performance of a future act, the navigating of the Malakoff and is therefore classed among promissory warranties. The contract depends upon the event taking place literally, and Philips, at p. 762, says, " it is held that the intention of the parties in a warranty " except as the meaning of the words used, is not to be in- " quired into. The assured has chosen to rest his claims " against the insurers on a condition inserted in the contract, " and whether the fact or engagement which is the subject of " the warranty be material to the risk or not, still he must " bring himself strictly within that condition. The rigid cons- " truction put upon warranties, in this particular, has perhaps " arisen in part from maxims of the Common Law, that con- " ditions are to be severely construed in regard to the party " imposing them upon himself." And Ellis, p. 29, concludes the matter thus: " A breach of warranty will avoid the contract. " The doctrine of warranties has been a more frequent subject " of discussion in cases of marine policies; but, so far as it is " applicable to the subject, that doctrine is of equal authority " in cases of life and fire insurance. A Warranty is a stipula- " tion or agreement on the part of the insured in the nature " of a condition precedent, and as applicable to fire policies, is " usually of an affirmative nature, as that the property in- " sured is of the nature described in the policy, A Warranty " being in the nature of a coudition precedent, it is quite im- " material for with what purpose or with what view it is " made; but, being once inserted in the policy, it becomes a " binding contract on the insured; and unless he can show " that it has been strictly fulfilled, he can derive no benefit " from the policy. The meaning of a Warranty is to preclude " all questions whether it has been substantially complied " with or not; if it be affirmative it must be literally true; if " promissory it must be strictly performed. The breach of " warranty, therefore, consists either in the falsehood of an " affirmative or the non-performance of an executory stipula- " tion. In either case the policy is void, and whether the

" thing warranted be material or not, whether the breach of it
" proceeded from fraud, negligence, misinformations, mistakes
" of an agent, or any other cause, in consequence, is the same.
" With respect to the compliance with warranties. there is no
" latitude nor equity. The only question is whether the thing
" warranted has taken place or not, or be true or not; if not,
" the insurer is not answerable for any loss, even though it did
" not happen in consequence of the breach of the warranty."
" Considering the statement in the policy to be a warranty,
" the Court is constrained to go beyond according the motion
" for a new trial in this cause, and to adjudge finally
" upon the motion *non obstante*, and order the judgment to be
" entered upon the record for Defendants, notwithstanding
" the verdict in favour of Plaintiff."

" The Court doth dismiss the motion of Defendants in arrest of judgment. And, the Court, proceeding to adjudicate upon the other two motions of Defendants, and considering that the declaration of Plaintiff, in the Policy of Insurance upon which the present action is brought, and enunciated in the following words, "now lying in Tate's Dock, Montreal, and intended to navigate the St. Lawrence and Lakes, from Hamilton to Quebec, principally as a freight boat," contains an express condition and warranty that the steamer "Malakoff," mentioned in and insured by the said Policy, would and should navigate the St. Lawrence and Lakes, from Hamilton to Quebec, principally as a freight boat, during the season of navigation, and was a condition of the Policy to be kept and observed; and, considering that it is admitted by Plaintiff, that said condition and warranty was not complied with, and that the steamer Malakoff always remained in Tate's Dock, and did not so navigate; and, further, considering that the verdict of the Jury, in disregarding this warranty and condition, was rendered contrary to law and evidence, doth grant the motion of Defendants, that the action of Plaintiff, *non obstante veredicto*, be dismissed, and, in consequence, the action and demand of Plaintiff is hence dismissed, with costs. And the Court doth order that Defendant do take nothing by their motion for a new trial, the same being unnecessary, in consequence of the granting of the motion for the dismissal of Plaintiff's action."

The Appellant appealed against this judgment of the Superior Court to the Court of Queen's Bench of Lower Canada, consisting of the Chief-Justice, SIR L. H. LAFONTAINE, and the Justices AYLWIN, MONDELET, DUVAL, and MEREDITH, who, by their judgment, dated the 3rd of June, 1861, affirmed the judgment of the Court below. The Chief-Justice dissenting.

Here follow the remarks of the judges in the Court of Queen's Bench :

AYLWIN, J. : The practice of Insurance against fire, or *Assurance terrestre* is comparatively of recent introduction into France. It was not known in our old law, and therefore no writers upon it are to be found before Quenault, whose book upon the subject was printed in 1828. The law of England was imitated and copied in France, and Quenault went so far as to append to his treatise a translation of so much of Sergeant Marshall's book as treats upon the subject and of the forms of Policies used in London. In Lower Canada Insurance was put in practice not very long after the conquest in 1759 ; for many years no cases came before our Courts as the Policies were underwritten in England, and the Companies could only be sued there, but, about the beginning of this century, the Phœnix Company relaxed their rule, and consented to be sued in our courts, and we have had several cases here. As a matter of necessity, the Policies, which were in the english form, were construed according to the law of England, and it was only about the year 1842, in the case of DILL vs. THE QUEBEC FIRE ASSURANCE COMPANY, (1 *R. J. R. Q.*, p. 471,) that any reference was made to the modern french books. Unwilling as I always am to resort to any other system of law than our own, I am yet constrained to say that in my opinion we have adopted the law of England upon this subject ; and I should deprecate its being set aside in order to adopt the modern french law. Supposed equitable considerations are made to enter in France, into the construction of policies ; instead of a rigid construction, as given in England and America, a latitude is given by the french, inconsistent with the terms of an aleatory contract into which nothing per œquipollentem can be made to enter. The insurer has a right to say, *non hæc intra fœdera veni.* In the present case, whether the wards of the Policy declared upon, "*now lying* "*in Tait's dock, Montreal, and intended to navigate the St-* "*Lawrence and Lakes from Hamilton to Quebec, principally* "*as a freight boat, and to be laid up for the winter in a* "*place approved by this Company*" contain a warranty or whether they amount to a representation, the fact that the vessel never left the dock at all, and was burnt there nearly a year after the risk was undertaken, is decisive of the case. I differ from the learned judge who presided at the trial, and willingly subscribe to the doctrine laid down by the other learned judge, whose judgment is now under review, and who has bestowed so much labor on the case, and has treated it with so much ability that I deem it unnecessary to make any addition whatever to what has been already said upon this

head. In this case the trial was by a Jury upon a series of questions. The eighth question put to the jury was improperly put; it was for Appellant, to shew strict compliance with the terms of the Policy, and this he has signally failed to do. The answer to the eleventh question, is no answer at all, and ought not to have been received by the court, who should have compelled the jury to answer categorically. The question is faulty, the first portion of it was unnecessary, the policy spoke for itself, the materiality of the representation was improperly put, and three distinct propositions are jumbled together, to the second of which there is no response at all. That the verdict was bad there can be no doubt. I now come to the mode of getting rid of it. Respondent simultaneously made three motions to effect his purpose, and the court gave him judgment non obstante veredicto. This is at variance with the practice in England, where but one motion would be receivable, and where it is not competent for a Defendant to move for judgment non obstante veredicto. With us, the mode of proceeding adopted by Respondent has been so long sanctioned by the court below, that it would be dangerous to change it, even supposing it to be wrong. It is to be observed that the practice in England is not fairly applicable to trial by Jury upon a special case put in the shape of written questions. The verdict in such cases is under our law a special verdict; the 13th question or rather the first portion of it "Do you find for Plaintiff or Defendants" was improperly put; it was for the court and not for the jury to draw the legal inference, and to determine in whose favor the facts specially found were to operate. This question gives rise to a general verdict, whereas the law intended to confine jurors to a special verdict and distinct findings. By our statute of the 20th Victoria, cap. 44, sect. 42, if "any portion of the judge's "charge is objected to by eitheir party, the judge shall at the "request of such party, put such portion of his charge in writ-"ing, either at the time of the trial or as soon after as conve-"niently may be, mentioning that it was so objected to, and "*then such portion of the charge so put in writing, being* "*signed by the judge, shall become part of the record in the* "*case.*" Under the 14th and 15th Victoria, cap. 89, sect. 4, "No "bill of exceptions shall be filed at or in relation to any trial "by jury, but the Judge presiding at any such trial shall "make or cause to be made under his supervision, full notes, "of the verbal testimony adduced at such trial and of all "exceptions or objections made or taken at such trial; and "such notes shall be read by the Judge or by the Prothono-"tary of the court, at the oral request of any party to any "such suit, proferred at any time during such trial, or imme-

"diately after the close thereof, in order that any error or "omission found therein may be corrected or supplied; the "same section of the statute last cited, provides that a fair "copy of such notes shall be made out by the Prothonotary "or clerk of the court, and after being certified by the judge, "*shall be filed of record in the cause, and shall in case of* "*Appeal* from the final judgment pronounced in any such "suit or action, be transmitted to the Court of Appeals, as "forming part of such record, and shall be considered for the "purposes of such appeal, as forming *a true record of the evi-* "*dence adduced on the trial*, and of all other proceedings "mentioned therein, and *as supplying the place of a bill of* "*exceptions, whenever* such bill would have been required, but "for the next preceding section." In the case of Casey & Goldsmid, (3 *R. J. R. Q.*, p. 144,) which was also a case of Insurance, the court below upon the answers of the jury, gave judgment in favor of Defendant. That judgment was reversed in Appeal, and judgment was intered up in favor of Plaintiff. I dissented from the judgment, being of opinion that the case should be sent back again to the jury, and that the question propounded to the jury should be remodelled and a question added, which seemed to me to have been improperly omitted. Since that case our courts have constantly given judgment upon the record as it stood, and have never sent a case to be tried over again by the jury. Certainly the object of the legislature in requiring special verdicts upon a series of questions put to the jury, was to enable the courts to deal more readily with cases. The jury system had become an abuse. Juries obstinately persisted four and five times over in giving general verdicts, in the face of the judge's charge and ruling in matter of law. Casey and Goldsmid was decided on the 14th January, 1854; we have therefore upwards of seven years practice, and I will not undertake now to say that it is a wrong one. It will be for the Judicial Committee of the Privy Council to determine whether the question of practice can be entertained at all, but no power short of that of the court of ultimate resort can properly undertake to alter the now settled practice, be it good or bad.

MONDELET, J.: After turning over in my mind, the clause of the policy of insurance which gives rise to the question which is raised in this cause, I have come to the conclusion, that both the spirit and the letter of the policy, warrant the opinion that the words "now lying" meant that the Malakoff was in the dock temporarily only, and the words "intended to navigate" that it was the intention of the Insured and the stipulation in his favor of the Insurer that the Steamer was insured with the risk resulting from the navigation on the

river St. Lawrence and Lakes, and no other risks during the season of navigation. As to the winter quarters, they had to be subjected to the approval of the insurers "to be laid up for the winter in a place to be approved of by the Company." It appears to me, independant of what Wood says, that higher risks would have been asked, if it had been contemplated to leave the vessel in the dock; it seems to me that it is not reasonable to suppose and much less to affirm, that the insurers would have consented to run the risk of insuring a vessel which the owner would be at liberty to leave a whole summer in a dock, surrounded by houses, work-shops, shingles, and boys, and all kinds and sorts of people going to and fro, &c. It requires little reflection, to at once apprehend the difference in the risk and danger between navigating, and leaving the vessel in the dock. On the waters there is a *constant* vigilance and care over the boat, with plenty of means of counteracting the fire and its progress; in the dock none, especially at night. If it was not clearly intended that the boat should be used to navigate, how comes the stipulation that she was to be taken for the winter to a place approved of by the Company "to be laid up for the winter in a place to be approved of by the Company"? "To be laid up" surely meant that she was to be removed from the dock. Is it reasonable to say, that *at the close of the navigation*, a vessel which was intended to navigate would be removed from a dry dock and be laid up for the winter. Surely not. I am therefore of opinion, that the Court below was right in its judgment in favor of the Defendant (Respondent) *non obstante veredicto* and in dismissing Plaintiff's action.

LAFONTAINE, C. J.: C'est sur l'appel du Demandeur que nous sommes saisis de cette cause. Ainsi nous n'avons à nous occuper, ce me semble, que du bien ou mal-jugé sur la motion pour jugement *non obstante veredicto*. D'après la police d'assurance, la compagnie Défenderesse "do insure Benjamin "Grant against loss or damage by fire to the amount of "$4000.... the steamboat Malakoff now lying in Tate's dock "Montreal, and intended to navigate the St. Lawrence, and "Lakes, from Hamilton to Quebec, principally as freight boat "and to be laid up for the winter in a place approved by this "Company who will not be liable for explosions either by "steam or gunpowder." Il a été admis de la part du Demandeur que le bateau à vapeur, qui était dans le bassin de Tate lorsque l'assurance fut effectuée, n'en est pas sorti, et que c'est au même endroit qu'il fut détruit par le feu l'année suivante. La clause de la police d'assurance ci-dessus citée "intended to navigate &c. &c" a fait la base de la troisième exception de la Défenderesse, et a servi de motif au jugement sur la motion.

non obstante veredicto. L'on a vu dans cette clause une condition essentielle stipulée dans l'intérêt de la compagnie une *garantie* que le Demandeur lui donnait que de fait le bateau à vapeur serait employé à la navigation. La Défenderesse a été jusqu'à dire dans son exception que, s'il eût été ainsi employé le jour de l'incendie, il n'aurait pas été détruit par le feu, et elle a même pris sur elle d'affirmer dans son articulation de faits, qu'elle en fournirait la preuve! Comment, par quels moyens, c'est ce qu'il ne m'est pas donné malheureusement de comprendre. Le Juge qui a présidé au procès devant le corps de jurés n'est pas le même que celui qui a rendu le jugement sur les trois motions. Il paraîtrait que Mr le juge SMITH a donné à la clause dont il s'agit une interprétation différente de celle qui a été consacrée par le jugement. Il ne l'a regardée que comme contenant une faculté que le Demandeur stipulait pour lui-même, faculté dont il pouvait user ou ne pas user, selon qu'il le trouverait de son intérêt. Je partage l'opinion de Mr le Juge SMITH. L'examen de la prétention de la Défenderesse doit porter d'abord sur une question de faits. C'est celle du plus ou moins de risque qu'il pouvait y avoir pour l'assureur. La Compagnie l'a si bien compris qu'elle a prétendu que le bateau restant dans le bassin de Tate, le risque était, pour elle, plus grand que s'il eût été employé à naviguer. C'était là un fait sur lequel le jury devait être appelé à prononcer, dans l'hypothèse où la clause aurait pu devenir, dans l'événement, susceptible d'avoir le sens que le jugement lui donne. Nous avons sur ce point l'opinion de la Défenderesse elle-même qui, dans sa suggestion écrite, faite au juge pour arrêter les questions qui devaient être soumises au Jury, posa la question suivante : " Was the said steamer exposed to greater risk and damage from fire in the said dock than if she had been navigating in conformity with the laws of this Province respecting steamboats and steamboat Inspection ? " La suggestion a été adoptée et forme la huitième question soumise au Jury et à laquelle le Jury a répondu négativement. L'effet de cette réponse, est d'ôter à la Défenderesse tout prétexte qu'elle pouvait avoir à alléguer à l'appui de sa prétention. Puisque, de fait, le risque n'était pas augmenté pour l'assureur, il était donc indifférent à celui-ci que le bateau fût employé ou ne fût pas employé à la navigation, le bateau ne devant pas naviguer pour son profit. Au contraire, la navigation ne pouvait avoir lieu que dans l'intérêt du Demandeur, si elle dût être profitable. Le Demandeur en était seul le juge. Il était donc bien naturel qu'il se réservât la liberté de faire naviguer son bateau, et à l'exercice ou non-exercice de cette liberté de la part du Demandeur, la compagnie n'était en aucune manière intéressée. Le choix du lieu d'hivernement devait

être approuvé par la compagnie, il est vrai, mais cela était subordonné à l'exercice de la faculté que le Demandeur avait stipulée. L'assurance a eu lieu le 30 juillet, 1858. C'était durant la saison de la navigation, aucun délai n'était donné au Demandeur. Si donc la prétention de la compagnie était fondée, il s'ensuivait que si l'incendie avait eu lieu le lendemain même de l'assurance, le Demandeur n'aurait pas eu le droit d'invoquer son assurance.

DUVAL, J.: The question as to whether there was an increase of risk should not have been put to the jury. It was enough, when the fact was admitted, that the vessel did not leave the dock to shew that under the policy no action ought to be maintained against the Company.

From this judgment the present appeal was brought.

M. H. MATTHEWS, for the Appellant: First, the policy in question contained no such warranty as the court below has assumed in their judgment. Assume, however, it contained a warranty, which is widely different from a representation. What is warranted? Intention is warranted: the words in the policy are "intending to sail." It is laid down that the statement of a mere intention in the policy is not a warranty of what is intended in a fire policy any more than in a marine one. 1 Phillips on *Ins.*, p. 474, (3rd edit.) 1 Arnould on *Ins.*, p. 633; Maude & Pollock's, *merchant shipping*, p. 351 (2nd edit.) If, therefore, the insured merely represents that he expects a thing to be done, the contract will not be void, although the event should turn out very different to his expectation: 1 Park, on *Ins.*, p. 444 (8th edit.) Here it is nothing more than a warranty of expectation, and evidence was given showing reasons why the "Malakoff" remained in dock. As the intention to navigate was a *bonâ fide* representation made and intended, the English authorities establish the principle that the assured is entitled to recover. Thus is *Lavabre* vs. *Wilson* and *Bise* vs. *Fletcher* (1) the words were "intends to sail in September or October next," and there as here the question was what was the real intention of the insured. 1 Park, on *Ins.* p. 439, *Barber* vs. *Fletcher* (2) is to the same effect. In *Dennistown* vs. *Lillie* (3) it was stated in the policy that the "*Brilliant* will sail," and such statement was held to be a representation or expectation of fact. The american authorities confirmed the same principle *Cathir* vs. *Springfield Fire Ass. Co.* (4) where a house insured was to be

(1) 1 Doug. 285, 67.

(2) 1 Doug. 306.

(3) 3 Bligh 202,

(4) 1 Sumner, 434.

occupied as a tavern, *Bryant* vs. *Ocean Assurance Co.*, (1) *Murdock* vs. *Chenango Mutual Assurance Co.*, (2); *Tillott* vs. *Kingston Mutual Ins. Co.* (3); *O'Neil* vs. *Buffalo Fire Insurance Co.* (4) *Alston* vs. *Mechanic's Insurance Co.* (5); As to warranty in *Shaw* vs. *Robberds* (6); it was for a "kiln for drying corn," but it was held to be no warranty to dry corn. only; 1 Phillips on *Ins.*, p. 471; 2 Park, on *Ins.*, p. 955; 2 Duer on *Ins.*, pp. 707, 40, 1, 2; 1 Arnould, on *Ins.*, p. 558. Here there was no control by the Appellant over freight; but it was necessary to stipulate for navigation, because dangerous, and goods might be shipped. In *Benham* vs. *The United Guarantee Ass. Co.* (7) the intention was to employ the Plaintiff as secretary with certain checks on his accounts, which were not observed, and it was held not to be a warranty. Again in *Notman* vs. *The Anchor Assurance Co.* (8) there were statements in a policy showing intention; a supposition that assured would go to Belize at once; but it was determined that it was not a stipulation that he shall go at once. Even a positive statement of facts beyond the knowledge or control of promiser is only considered as expectation or belief; *Bowden* vs. *Vaughan* (9): *Hubbard* vs. *Glover* (10); *Brine* vs. *Featherstone* (11). It is submitted upon these authorities that the judgment of the court below was wrong. What was warranted at most was intention *bonâ fide*, and that intention did exist. All the conditions contained in the policy were complied with, and the findings of the jury established all the facts necessary to entitle the Appellant to recover the amount awarded him by the court. Secondly, a Defendant has no right by the practice of the court in Lower Canada, which in this respect is similar to that of the english courts, to move for judgment *non obstante veredicto*. A Defendant can only move in arrest of judgment when each party pays his own costs: *Cameron* vs. *Reynolds* (12), *Rand* vs. *Vaughan* (13); 2 Chitty's *Prac.*, p. 1486. An arrest of judgment is only allowed where error is on the record in judgment for the Plaintiff. A special verdict does not alter the practice. The Lower Canada cons. statutes, pp. 713, 4, does not affect this point. Here the verdict of the jury was in favour of the Plaintiff on issues

(1) 22 Pickering, 200.
(2) 2 Cronstock, 210.
(3) 7 Barbour, 570.
(4) 3 Cronstock, 123.
(5) 4 Hill, N. Y. Rep. 330.
(6) 6 Ad. et El., 75.
(7) 7 Exch. Rep. 714. 21 L. J., 317, 320, Exc.
(8) 27 L. J. 275 C. P.
(9) 10 East, 415.
(10) 3 Camp. 313.
(11) 4 Taunt., 869.
(12) Cowp. 407.
(13) 1 Bingh. N. C., 767, 769.

which had been settled by the Superior Court with the concurrence of the Defendants, and had been raised by them; and there was also a general verdict for the Plaintiff on the thirteenth issue. There is no precedent in the practice of the courts in Lower Canada for such a judgment in favour of the Defendants, when there has been no inscription for hearing on the merits, and no motion made by the Plaintiff to enter judgment for him; nor after a previous and distinct motion for a new trial. Assuming that the Defendants had a right to move for judgment *non obstante veredicto*, yet that judgment is grounded on an erroneous interpretation of the policy, and can only be supported on the single ground that the policy contained a warranty that the Malakoff should navigate the St. Lawrence and lake from Hamilton to Quebec as a freight boat during the season of navigation. It is true the plea relies on a double defence, namely, a warranty that the Malakoff, should navigate, as a false and material representation prior to the policy.

MR. MONTAGUE SMITH, Q. C., and Mr. G. SHAW LEFEBVRE, for the Respondents.

The clause in the policy of insurance "intended to navigate the St. Lawrence and the lakes principally as a freight boat, and to be laid up for the winter in a place approved by the company," contains stipulations that the Malakoff should and would be so navigated and laid up, and constituted a condition of the insurance, which condition, it is admitted, was not complied with. Now, these words, if amounting only to misrepresentation, were material to the risk, and, not having been complied with, the Appellant cannot recover on the policy: Arnould, *On insurance*, p. 625; Angell, *On insurance* p. 174; *Notman* vs. *The Anchor Assurance Co.* (1); *Hamilton* vs. *Sheddon*, (2). It was shown at the trial that the risk that the Malakoff was exposed to at the time of the fire was not the risk contemplated by the parties. As to the next point now insisted on by the Appellant as to the irregularity of the motion of the Defendants for judgment *non obstante veredicto*, we submit that this tribunal will not interfere with the procedure of the *forum*, a Colonial Court governed by rules having no analogy with english courts, such practice being in accordance with the practice of the Canadian Courts. That there is no anology is obvious from the nature of the articulations or statements provided by the Lower Canada statute 14th and 15th Vict., ch. 89, sec. 4, relating to jury trials. It is like leave reserved to enter verdict for Defendant. Such has been the

(1) 27 L. J. 275, C. P.

(2) 3 Mee. and Wels. 49.

uniform practice, however dissimilar to ours, for eight years in the courts in Lower Canada: *Ferguson* vs. *Gilmour* (1): *Higginson* vs. *Lyman* (2). Lastly, as to the motion for a new trial.

LORD KINGSDOWN: That is not before us.

Their Lordship's judgment was delivered by Lord Kingsdown: On the 30th of July, 1858, Appellant effected an insurance with Respondent on the steamboat "Malakoff," by which the company engaged to assure Appellant against loss by fire to the steam-boat, for twelve months, to the extent of £1,000. The policy of insurance described the "Malakoff" "as now lying in Tates' Dock, Montreal, and intended to navigate the St. Lawrence and lakes from Hamilton to Quebec, principally as a freight boat, and to be laid up for winter in a place approved by the company, who will not be liable for explosion either by steam or gunpowder." The steamboat never left Tates' Warf, and was burnt there on the 25th June, 1859. An action was brought by Appellant, in the Superior Court of Lower Canada, to recover damages upon the policy. The case was tried by a jury, and a verdict found for Plaintiff. An application, by way of motion, was made to the court by Defendants on the 20th February, 1860, that judgment *non obstante veredicto* might be entered for Defendants, and that Plaintiff's action might be dismissed with costs. On the 31st March, 1860, the Superior Court made an order to this effect. The Plaintiff appealed against this order to the court of Queen's Bench in Canada, when it was affirmed, the chief justice dissenting from the majority of the judges. The case now comes before us on appeal to Her Majesty in Council from these several orders. The judgments in the courts below proceeded on the ground that the words which we have read from the policy contained a warranty that the steamboat should navigate the St. Lawrence and the lakes in the manner there described; and that, as in fact, she never left Tates' Dock, the policy became void. It was contended before us, in a very able argument, that the words referred to contained no warranty; but that if they did the warranty extended only to this, that an intention to employ the ship in the manner described was *bonâ fide* entertained by the insured when the policy was effected. It was argued that this would be the meaning of the words if they were merely representations, according to several authorities cited; and it was argued that though the effect of a warranty was very different from that of a representation, the meaning of the words used must be

(1) 4 R. J. R. Q., p. 74.

(2) 8 R. J. R. Q., p. 281.

the same, whether they were found in or out of the policy. Their Lordships are of opinion that the question depends entirely on the meaning to be attached to these words. If they import an agreement that the ship shall navigate in the manner described in the policy there being an engagement contained in the policy they must be considered as a warranty, and the engagement not having been performed, whether the engagement was material or not material, the insurers are discharged. But their Lordships think that this is not the true meaning of the words used. They consider that the clause in question amounts only to this; The assured says, my ship is now lying in Tates' Dock ; I mean to remove her for the purpose of navigation in the manner described, and if I do the policy shall still be in force; but in that case I engage to lay her up in winter in a place to be approved by the company. This construction, which implies no contract to navigate, seems to their Lordships the natural meaning of the words used, and imputes a reasonable intention to the parties to the policy. Their Lordships must, therefore, advise Her Majesty to reverse the judgments complained of, and to direct that Defendants' motion be dismissed. It is unnecessary to pronounce any decision on a point raised at the argument, viz.: that it is not competent to a Defendant in a suit to make a motion for judgment *non obstante veredicto.* Such appears to be the rule in England, but the practice in jury trials in Lower Canada differs in many and important respects from that which prevails in this country. Their Lordships are always indisposed to interfere with the judgment of a Colonial Court on a question of its forms and practice. It appears that, besides the motion of which we are now disposing, two other motions were made by Respondents in the Superior Court, one in arrest of judgment, and the other for a new trial. Neither of those motions is before us, and we do not express any opinion upon them, or intend to affect the rights either of Appellant or Respondents in respect of them. They will stand in the same situation as if the Queen's Bench had made the order upon this motion, which we think that it ought to have made. To prevent any misconstruction upon this point, which, however, we do not think likely, we shall advise Her Majesty to add to the order which we have already suggested, a declaration " that this order is not intended in any manner to prejudice the rights either of Appellant or Respondents, with respect to any other proceedings which have taken place, or may take place in the cause." (5 *J.*, p. 285; 11 *D. T. B. C.*, p. 128 et 330; 6 *J.*, p. 224; 12 *D. T. B. C.*, p. 386; 15 *Moore's P. C. Rep.*, p. 516.)

INSURANCE.—CONSTRUCTION OF POLICY.

SUPERIOR COURT, Montreal, 26th June, 1863.

Coram BADGLEY, J.

GRANT *vs.* THE EQUITABLE FIRE INSURANCE COMPANY.

Held: 1° That the following words in a fire policy: "On the hull and joiner work of the steamer "Malakoff" now in Tate's dock Montreal *navigating the River St. Lawrence, between Quebec and Hamilton, stopping at intermediate ports*, including outfitting in the spring, two thousand four hundred dollars; on the engine therein, one thousand six hundred dollars, as per application n° 17,783, filed in this office," describing the subject insured, imported an agreement that the vessel was navigating and to navigate.

2° That the works used must be considered to be a warranty, and the engagement not having been performed the insurer was discharged.

3° That in view of the warranty on the face of the policy and the admitted breach of it, the verdict of the jury was of no avail, and the court must look to the law beyond the verdict and dismiss the action. (1)

This was an action by Plaintiff, to recover from Defendant £860. The action was based upon a policy of insurance issued by Defendants, bearing date the 5th August, 1858, and covering a period beginning the 30th July, 1858, the date of the application for the policy by Plaintiff, and ending 30th July, 1859. By this action, Plaintiff claimed to recover an insurance against fire on the steamer "Malakoff," described in the policy in the following words: "On the hull and joiner work of the steamer "Malakoff" (now in Tate's dock Montreal,) *navigating the river St. Lawrence, between Quebec and Hamilton, stopping at intermediate ports*, including outfitting in the spring, two thousand four hundred dollars, on the engine therein one thousand six hundred dollars as per application n° 17,783 filed in this office." Two other insurances of a like amount were effected in the Ætna and another company. The steamer was destroyed by fire, in Tate's docks, on the 25th June, 1859, having never navigated, and in fact, having never left the dock. The claim of Plaintiff was for a total loss, less £300, the value of the remains; £2000 had been recovered from the other offices. The claim was resisted, on the ground that Plaintiffs had represented that the steamer was then navigating the St. Lawrence between Quebec and Hamilton, when she was in fact laid up as a useless and unproductive vessel. The Defendant, further, pleaded that Plaintiffs had warranted that the vessel was navigating, and that the policy was void, by reason of breach of the warranty. At the trial an admission of Plaintiff was produced, to the effect that the steamer was not navigating,

(1) V. arts. 2490, 2491, 2572 et 2574 C. C.

and had continued in the docks. The case went to trial before the Honorable Mr. Justice Smith, and a special jury, on the 14th April, 1863. The following issues were submitted to the jury, who returned the verdict stated beneath." " 1. Were the subjects insured wholly or partly consumed by fire, on the night of the twenty-fifth June, 1859, and, if in part, state what part or parts were so consumed by fire ? " *Answer.* " Were totally consumed, except the old iron valued at three hundred pounds, remains of engine." " 2. Was Plaintiff's interest in the subject insured, that of proprietor, to wit, on the fifth of August, 1858, up to and on the night of 25th June, 1859, and did he suffer loss by the burning thereof ? " *Answer.* " Yes." " 3. What was the actual cash value, on the 25th June, 1859, and immediately before the fire, of the subjects insured respectively, and if only partly burned, what was the actual cash value, immediately, after the fire of the parts respectively which were not consumed by fire ?" *Answer.* " Cash value before the fire: hull and joiner work £1800 ; engine and appurtenances £900, part not consumed, worth £300, remains of engine." " 4. Has the Plaintiff met the conditions of the said policy ?" *Answer.* " Yes." " 5. Were the hull and joiner work of, and the engine in, the steamer insured, at the date of the policy and fire, in two other insurance offices, and what were the names of said offices ? and was said other insurance indorsed by Defendants on said policy, and for what amounts were said subjects respectively so insured ? " *Answer.* " Were insured in the Home and Ætna offices, to the amount of £1000 each, and said insurances were endorsed on the policy." " 6. What amount of loss has Plaintiff suffered by said fire, in respect of which ought Defendants to have paid him ?" *Answer.* " £840, £600, in respect of hull and joiner work, and £240, in respect of engine and appurtenances." " 7. Was the steamer " Malakoff " on the 30th June, 1858, or at any other time between that date and the 30th July 1859, navigating the St. Lawrence between Quebec and Hamilton ?" *Answer.* " No." " 8. Did Plaintiff at, or before the time he agreed with Defendant for the insurance policy, represent to Defendants that the steamer " Malakoff " was then navigating the River St. Lawrence between Quebec and Hamilton, and was such representation material ? " *Answer.* " No." " 9. Was the policy of insurance aforesaid issued by Defendants at a lower rate of premium than would have been exacted by Defendants if they had known that the Malakoff was not navigating the St. Lawrence but was laid up in Tate's dock, and so remained laid up till her destruction by fire ?" *Answer.* " No." " 10. Was the said steamer and appurtenances insured at the date of the said policy and fire to the knowledge of

Defendants in how many, and what other Insurance Companies other than Defendants' and for what amounts respectively and were actions pending on the part of Plaintiff for the recovery of such amount of insurances ?" Answer: "Was insured in the Ætna and Home offices to the amount of $4000 each, and said insurances were indorsed on the policy: actions were pending for the recovery of the amount of insurances". "11. Did Plaintiff, when applying for the said insurance, conceal from the Defendants the fact that the hull of the Malakoff was and had been the hull of the old steamer North America, and was such concealment material ?" Answer: "No." After the trial, Defendants following the precedent established in the case of *Grant* vs. *The Ætna Insurance Company*, (V. *suprà*, p.290.) moved that, inasmuch as there was in the policy of insurance an express warranty that the steamer was then navigating and would continue navigating, which warranty had not been complied with, and, inasmuch as the evidence produced at the trial had proved material misrepresentation and concealment by Plaintiff in his application for said policy, and the verdict of the jury was rendered contrary to law and evidence, that, notwithstanding the verdict found by the jury in favour of Plaintiff, judgment be entered up in favor of Defendants, and that, by such judgment, it be adjudged that the policy, in consequence of such breach of condition and warranty, is null and the same be set aside, and the action of Plaintiff dismissed. The court, by the Hon. Mr. Justice BADGLEY, granted the motion, and dismissed Plaintiff's action. His honour in rendering judgment said: "This is an action on a policy of insurance effected by Plaintiff with Defendants, for one year, from the 30th July, 1858, for $4000, on the steamer Malakoff, destroyed by fire, on the 25th June, 1859; and in which action a verdict was rendered against Defendants for £840. The case comes upon the motion of Defendants, upon grounds stated, to set aside the verdict and to enter up judgment for them. The policy of insurance was effected through George Tate, Plaintiff's agent and was dated on the 5th August, 1858 to take effect for one year from the 30th July previous, and was as follows, "on the hull and joiner work of the "steamer Malakoff (now in Tate's dock, Montreal), navi-"gating the river Saint Lawrence between Quebec and "Hamilton, stopping at the intermediate ports, includ-"ing outfitting in the spring $2400, on the engine therein "$1600, as per application 17,783." The application referred to was signed by George Tate, as Plaintiff's agent, and contained the same identical subjects of the steamer Malakoff navigating the St. Lawrence between Quebec and Hamilton, stopping at the intermediate ports, but dit not mention the

words (now in Tate's dock Montreal ;) an unsigned paper was also produced, attached to the application which described the said *subjects*, and also contained those words not to be found in the application. The insurance was of course subjected to the conditions printed on the back of the policy, which was also endorsed with two other policies effected by Plaintiff upon the same steamer, &c., at the Ætna and Home offices, each for $4000. The Plaintiff's declaration set out the policy, the subjects insured, the time and amount of the insurance, the destruction of the steamer by fire on the 25th June, 1859, whilst lying in Tate's dock, whereby Plaintiff suffered the loss of the sum by him insured, and prayed for its recovery ; this Defendants resisted upon the several grounds set out in their pleadings, and which comprehended breach of warranty, misrepresentation, concealment, all voiding the policy, and alleging in substance that Defendants' contract of insurance was effected upon the statement to them made by Tate, Plaintiff's agent, as set out in the application and policy, namely, that the steamer was navigating, the river St. Lawrence, &c., stopping at the intermediate ports, and that she was a new boat ; whereas, in fact, she was not navigating, but was laid up, and moreover that she was the hull of an old steamer. The cause having been left to a jury, they found the total destruction of the subjects insured, except the remains of the engine which they valued at £300 ; Plaintiff's interest in the insurance, the cash value of the subjects insured immediately before the fire, at £1800, on the hull and joiner work, and £900 on the engine and appurtenances, less the sum of £300 for remains of the engine ; Plaintiff's compliance with the terms of the policy, his loss of £840, under this policy, namely £600 on hull and joiner work, and £240 on the engine and appurtenances ; that the Malakoff had not at any time navigated the river St. Lawrence during the period of risk until her destruction ; that no lower premium was exacted than if Defendant had known that she was laid up ; that Plaintiff did not represent to Defendants that she was then so navigating, nor did conceal from them that her hull was that of the old steamer. The Defendants' motion rested 1st, upon the breach of the condition and warranty contained in this policy that the steamer was navigating ; 2d, upon Plaintiff's material misrepresentation and concealment in his application for the policy ; and 3rd, that the verdict found was contrary to law and evidence, and that it should be set aside, and judgment rendered avoiding the policy and dismissing Plaintiff's action. The Plaintiff has assimilated this case to the previous case of the same Plaintiff against the Ætna office, one of the insurances, whose policies were indorsed on this policy, and which was finally decided in

Plaintiff's favour, by the judicial committee of the privy council, maintaining the verdict rendered for him in that case, and he has required that the same interpretation should be applied in this case as was applied to that; that the policy should be construed in a plain sense, such as laymen would apply to such acts, and that the rule as to the insurer's intention should control this case; in other words," that a statement of information, expectation, belief or intention set out in the policy on the part of the insured is not a warranty of the truth of that which is intended, believed, &c., but, at most, a representation or perhaps a warranty that such is really the belief, or intention of the insured at the time the statement is made." This is American doctrine, as found in Sumner's Reports, 434; 2 *Duer*, p, 614, and has to some extent been supported by the interpretation put upon a part of that contract by the tribunal in England: the entire contract was not read there; the interpretation given to the terms of the policy, was confined simply to the words " intended to navigate; " and upon the interpretation made by that tribunal the judgment in England was rendered. However that may be, it is manifest that the terms of the two policies do not assimilate. In the Ætna policy, the terms were " upon the Malakoff, now lying " in Tate's dock, Montreal, and intended to navigate the Saint- " Lawrence and lakes, from Hamilton to Quebec, &c., and to " be laid up for winter in a place approved by the company." The terms of Defendant's policy are " on the steamboat Malakoff, (now in Tate's dock, Montreal,) navigating the river St. Lawrence, between Quebec and Hamilton, stopping at the intermediate ports," &c. The difference between these *two policies* is plain and manifest, and not only so, but it is the difference between the intention to do a thing and the doing of it, the intention and the act. In this instance, it is not a case of intention *bona fide*, or otherwise, entertained by the insured when the policy was effected; it was not something impossible which the insured intended should take effect or be made operative in *futuro;* on the contrary it was the fact of the thing being done in *præsenti*. It will be seen that the words *now in Tate's dock, Montreal*, are in brackets, and are only incidental to the main action of the steamer, navigating the St. Lawrence and stopping at the intermediate ports; now as already observed, it was reported in the Ætna case that the question dependent upon the meaning to be attached to the words of the policy *intended to navigate*, which were held not to be a contract to navigate; but the court, at the same time, declared that, if these words had imported an agreement that the vessel shall navigate in the manner described in the policy, then being an engagement contained in

the policy, they must be considered as a warranty, and the engagement not having been performed, whether the engagement was material or immaterial, the insurers would be discharged. When the assured says, "I am navigating my vessel and stopping her at intermediate ports, although now in Tate's dock," the only reasonable and true natural meaning is the navigating of the vessel; and without going over the authorities referred to in the Ætna case, which are familiar to the bar, it is sufficient to observe that the words in this policy constitute the agreement referred to by the Judicial Committee, and that, as such, they are subjected to the consequences of a breach of the condition by the insured. Without referring at any length to authorities it is sufficient to say that "a war-"ranty by the assured, in relation to the existence of a parti-"cular fact, must be strictly true, or the policy will not take "effect: this is so, whether the thing warranted be material to "the risk or not: it would perhaps be more proper to say that "the parties have agreed on the materiality of the thing "warranted, and that the agreement percludes all inquiry on "the subject." It is in evidence that the insurers, Defendants, did rely upon the thing, and were thereby induced to enter into the contract which they would not otherwise have done, and, therefore, the material want of truth respecting it necessarily avoids the policy; whatever it may result from whether mistake, accidents or otherwise, the insured is bound by it. This is not a question of the mere change in the use or disuse of the steamer, the subject insured not increasing the risk, but it is the existence of a fact constituting the agreement upon which the insurance was entered upon by the insurers. Many parts of the finding of the jury with reference to the words of the contract and the materiality or otherwise of the representations made go for nothing; the jury could not pass upon or interpret the contract. Moreover the verdict found the cost value of this steamer to be £2700, less £300, for remains of engine. The entire loss was therefore, £2400, of which the verdict found £2000 were covered by the Ætna and Home policies, which were proved to have been paid before this trial, so that the exact loss suffered by the insured and for which they could claim to be indemnified so far as this policy is concerned, is only £400; the verdict is for £840. For this and other defects, the verdict is liable to be set aside, but the motion does not ask for a new trial, and merely calls upon the court to render a judgment in the cause to decide the contestation, which the parties are entitled to demand; the judgment will not rest upon facts of evidence which may have been incorrectly found and might be submitted once again to a jury for correction, but it rests upon the breach of an admit-

ted agreement which the law declares, annuls the contract sought to be enforced whatever the evidence may be, required no verdict to settle or interpret and which can only be decided by the court. In this case, and in all such cases, the court must look to the law beyond the verdict, and by applying the law itself declare the legal result. The law does not support or assist the verdict; it goes directly to the action, and seeing the warranty on the face of the policy, and the fact of its breach being admitted, the verdict of the jury as to the facts of the case is of no avail and the judgment must therefore be rendered against Plaintiff, granting Defendants' motion, and dismissing Plaintiff's action."

"The court having heard the parties, upon the motion of Defendants' the 18th day of April, 1863, considering that the declaration of Plaintiff in the policy of insurance upon which this action was brought, and enunciated in the following words; "on the following property owned by assured, namely, on the hull and joiner work of the steamer Malakoff (now in Tate's dock, Montreal) navigating the river St. Lawrence, between Quebec and Hamilton, stopping at the intermediate ports, including outfitting in the spring," contains an express condition and warranty upon and for the steamer Malakoff mentioned in and insured by said policy, and was a condition of the policy to be kept and observed, and considering that it is admitted by Plaintiff, that said condition and warranty were not complied with, and that the steamer was not navigating, and did not navigate, at any time, in and from the effecting of the insurance until the destruction thereof by fire, and always remained in Tate's dock; and, further, considering that the action and *demande* of Plaintiff was unfounded in law, doth, notwithstanding the verdict, grant the motion of Defendants that the action of Plaintiff be dismissed and, in consequence, Plaintiff's action and *demande* is hence dismissed with costs." (8 *J.*, p. 13.) (1)

MACKAY and AUSTIN, for Plaintiff.

TORRANCE and MORRIS, for Defendants.

(1) The following is the charge of Mr. justice Smith to the jury who tried the issues: "This is an action brought against the Equitable Fire Insurance Company, to recover on a policy of insurance effected with that company, on the steamer Malakoff. This vessel was insured in three offices, the Etna, Home and Equitable, for £3000, in all, and the present action is brought for the third part of that sum, which was the amount actually insured in this company, and claims one third of the actual loss sustained. Thus, the Equitable is mingled with the other companies in the risk and loss, but, I need hardly tell you, stands in this action upon its own policy and contract entirely. The Malakoff was destroyed by fire, in June, 1859; and Defendants refused to pay on three grounds. Their three objections to the policy are: 1° Breach of warranty on the face of the policy. They say that something is there stated which is not the truth, and that this is a breach of warranty, and Plaintiff cannot

VENTE.—PROHIBITION D'ALIÉNER.—CLAUSE RESOLUTOIRE.

COUR DU BANC DE LA REINE, Montréal, 6 septembre, 1861.

Coram Sir L. H. LAFONTAINE, Bart, Juge-en-Chef, AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET (C.), J. A.

LYNCH, Demandeur en Cour Inférieure, Appelant, et HAINAULT, Défendeur en garantie en Cour Inférieure, Intimé.

Jugé: 1° Qu'une vente d'immeuble à la charge d'une rente viagère est susceptible des mêmes modalités qu'une donation onéreuse.

2° Que, dans une telle vente, la prohibition d'aliéner peut être valablement imposée à l'acquéreur, avec clause résolutoire, en cas de contravention. (1)

3° Qu'une telle vente ou donation onéreuse peut, en vertu d'une clause résolutoire, être résolue, du consentement mutuel du vendeur ou donateur et de l'acquéreur, à l'encontre des intérêts des tiers.

4° Que cette résolution volontaire est valable, à l'encontre des tiers, lors même qu'elle ne paraît pas avoir été causée par l'événement prévu dans la cause résolutoire.

5° Qu'une rétrocession de la part de l'acquéreur ou donataire, *pour bonne et valable considération*, a le même effet, à l'égard des tiers, qu'une résolution prononcée en justice. (2)

6° *Specialiter.* Que l'hypothèque créée en faveur d'un tiers par l'acquéreur ou donataire, pendant sa possession, est anéantie par cette résolution volontaire, quoique non causée par l'événement résolutoire, et quoique faite sous forme de rétrocession, pour bonne et valable considération.

Le 20 Février, 1854, Prosper Routier reconnut devoir au Demandeur, et promit payer, le 1er Mai, 1855, la somme de £39 2s. 0d.; avec intérêt après échéance, et hypothéqua "une terre à lui appartenant, située dans la 4ème concession d'Helenstown, de la Seigneurie d'Annfield, dans la paroisse de St. Timothée, de la contenance de deux arpents et demi de largeur, sur une longueur de vingt arpents, bornée, en front, par le chemin de la Reine, en profondeur par les terres du 5ème

recover; 2° That there was misrepresentation at the time of the contract. That the truth was not stated to them. If it had been they would have asked a larger premium. That this was therefore material; 3° That, at the time of the insurance, Plaintiff concealed from Defendant the fact that she was not a new boat, but the hull of the old steamer North America. The policy, the loss, the value are admitted, and it is admitted that the requisite conditions have been complied with on the part of Plaintiff. As to the first point, Defendants say the vessel was described as navigating, and that that was untrue, and being incorporated in the policy became a warranty. There are two descriptions of warranties, express as to matters of fact, and description, and promissory, undertaking that something shall be done. "Now in Tate's dock navigating the river St. Lawrence between Quebec and Hamilton stopping at intermediate ports." The Defendants say that this is a warranty that she was then navigating. But what is

(1) V. art. 970 C. C.

(2) V. art. 1536 et 2100 C. C.

rang d'Helenstown, du côté Sud-Ouest, par Etienne Lefebvre, et, du côté Nord-Est, par Prosper Routier, père, avec une maison dessus construite." Cet acte avait été enrégistré le 1er Mars, 1854. Le Défendeur Laplante était poursuivi hypothécairement comme détenteur de cet immeuble. Sur cette poursuite, Laplante appela Louis Hainault en garantie, fondant son action sur la garantie résultant de la vente, que ce dernier lui avait faite de l'immeuble en question, par acte du 2 Septembre, 1857. Ainsi poursuivi, Hainault intervint et contesta l'action. Le 20 Juin, 1853, Hainault et son épouse avaient vendu à Prosper Routier l'immeuble sus-décrit. Cette vente avait été faite à la charge par Routier de payer, fournir et livrer à Louis Hainault et son épouse, ou au survivant d'eux, sans diminution au décès de l'un d'eux, annuellement, la juste moitié de tous les produits, tant naturels qu'industriels, de la terre, livrant tous les grains battus et vannés, les foins et autres produits en bonne saison et en bon ordre. Il était déclaré, dans cet acte de vente, que telle vente était faite à telles conditions, vu la connaissance particulière que les vendeurs avaient de l'habileté de l'acquéreur, et que telle vente avait été faite sous l'expresse condition, (sans laquelle la dite vente n'eût pas eu lieu) que l'acquéreur ne pourrait de quelque manière que ce fût, vendre, échanger, ni même hypothéquer le dit immeuble durant la vie des vendeurs, sans le consentement exprès et par écrit de ces derniers ; et, il fut déclaré, par le dit acte, que, s'il arrivait que, nonobstant cette prohibition, l'acquéreur prit sur lui de vendre, échanger ou hypothéquer le dit immeuble, sans le consentement des vendeurs et de leur vivant, *dans tel cas, il serait loisible aux vendeurs de reprendre le dit immeuble*, toutes les susdites charges et conditions étant considérées comme le prix de la jouissance du dit im-

the real meaning of these words? The Plaintiff was bound to describe the the property as it actually was. He says she is in Tate's dock. But had he stopped there he must have left her in dock during the period, for had be taken her out for a single moment, then confined to that restricted representation he could not have recovered. The very words *now* in Tate's dock clearly show that she was only there for a time, and that the vessel was or had been navigating and as she was then in Tate's Dock, it was necessary to state it to preserve her right of navigating as she had always done. But, as has been proved, the vessel was meant to navigate, and had been navigating previously, and Plaintiff sought to preserve to himself the free privilege of her continuing her occupation if circumstances favored. Thus the words "navigating the river St. Lawrence" are introduced. Imagine any thing else, and the sentence involves plain contradiction. The Plaintiff virtually says; "I have got a "vessel in the habit of navigating; she is now in Tate's dock, but I reserve "my right to navigate if I choose to run my vessel." It is monstrous to suppose that there was an express undertaking to navigate; according to Defendants' contention, had she gone into harbour, Plaintiff could not have recovered. The second point, as to the representations, depends upon the other to a great extent. I do not think you can have any hesitation in coming to the conclusion that there was no misrepresentation; Tate reserved his right to

meuble. Le 24 novembre 1855, Prosper Routier *rétrocéda et remit*, POUR VALABLE CONSIDÉRATION, à Hainault et son épouse, l'immeuble en question, et, par un autre acte du 2 septembre 1857, ces derniers le vendirent, pour valable considération, à Laplante. Hainault énonça comme proposition légale que l'hypothèque donnée par Prosper Routier à O. Lynch, est nulle et de nul effet, vu que Routier est devenu propriétaire de ce bien sous la condition expresse qu'il ne pourrait vendre, échanger ou hypothéquer, sans le consentement par écrit de Hénault et son épouse qui n'ont jamais donné un tel consentement ; qu'en conséquence de cette prohibition, l'immeuble est rentré libre de toutes hypothèques entre les mains de Hainault, au moyen du dit acte de rétrocession, prohibition connue de Lynch. A cette défense l'Appelant répondit en droit que le Défendeur en garantie, reconnaissant avoir vendu l'immeuble à Routier, il reconnaissait par là même le droit qu'avait ce dernier de l'hypothéquer ; que la prohibition d'aliéner et hypothéquer, telle qu'alléguée, était sans effet légal, sous les circonstances mentionnées dans l'exception ; que, si cette prohibition était incompatible avec la vente que l'on admettait avoir eu lieu ; que, si cette prohibition était légale, elle aurait eu pour conséquence de laisser cet immeuble sans propriétaire durant la possession de Routier, puisque, ni ce dernier, ni Hainault n'auraient pu l'aliéner ni l'hypothéquer ; que Hainault alléguant lui-même que Routier l'avait rétrocédé, pour valable considération, il affirmait lui-même que la vente avait été parfaite ; qu'en supposant une valeur quelconque à la prohibition, elle ne pouvait avoir d'effet qu'à l'égard de Hainault et son épouse, et seulement durant leur vie, et qu'il n'était pas au pouvoir de Routier, de concert avec Hainault, de frustrer l'Appelant de son hypothèque, ainsi qu'ils croient avoir pu le faire. Par jugement du 8 octobre 1860, la Cour Inférieure a donné gain de cause à

to navigate. Suppose he did say, she was to navigate, she must rest somewhere. In point of fact she did navigate ever since she was rebuilt. At the time of the policy it happened that she was not running. Then as to the third point, if you believe Tate's evidence, he did not state the vessel was new ; further it was notorious that she was the old North America. She was so registered. Where then was the concealment ? Tate was not bound to state this. He says he did not state it. The policy is a fire policy, not a marine one ; further, the subject was there, and her condition could have been ascertained. What difference would these representations have made in the risk ? The insurance companies say there is greater risk to a vessel in dock in summer than when navigating. Common sense is completely against such a view. A vessel navigating has fire in full play besides many attendant combustibles such as oil, &c. Is this a greater danger than a vessel in a dock 300 feet square and with, so far as the evidence goes, no vessel proved to have been near her. Whatever the companies may say, common sense dictates the answer to such a question. I charge you, gentlemen, that, in point of law, there is not the slightest defence to this action.

Hainault. Voici le résumé des motifs de ce jugement : " Considérant que la vente de Hainault à Routier (20 juin 1853) est une véritable donation onéreuse, contenant libéralité, les charges n'étant que viagères ; et que Hainault avait droit de stipuler la prohibition d'aliéner, et que la contravention à cette prohibition a donné ouverture à l'exercice du droit que Hainault, s'était réservé de faire résoudre le dit acte de vente ; Considérant que Routier a rétrocédé et remis le dit immeuble à Hainault pour demeurer quitte envers lui, et qu'ainsi l'acte de vente a été anéanti, comme s'il n'avait jamais existé, par l'exercice du droit que Hainault s'était réservé de faire résoudre cet acte en cas d'aliénation ; Considérant que Lynch n'a pu acquérir d'hypothèque, à l'encontre de la prohibition d'aliéner et de la résolution du dit acte, résultant de la contravention à cette prohibition, et qu'ainsi il n'a pas l'hypothèque qu'il réclame, la cour déboute son action."

Prétentions de l'Appelant : Sans rechercher si cette vente contenait une libéralité qui pouvait l'assimiler à une donation, on peut, sans danger, pour le résultat de l'examen des faits et du droit, raisonner dans l'hypothèse d'une donation purement gratuite, avec prohibition d'hypothéquer, violation de la prohibition et rétrocession de la propriété ; mais, en notant bien deux circonstances : 1° La résolution est volontaire. 2° Elle a lieu, *pour valable considération*, et non comme conséquence de la violation, c'est-à-dire qu'elle n'est pas causée par la clause résolutoire. La question ainsi posée démontre que le motif déterminant du jugement repose sur une base vicieuse, où le fait a dû être perverti pour donner raison à la conclusion du jugement. En effet, on part de ce point : les vendeurs ont exercé la clause résolutoire contenue dans leur vente. Nullement, ils n'ont pas même songé à cette clause ; ils n'ont ni demandé ni exercé la résolution, ils ont acquis de nouveau, ils se sont fait rétrocéder *pour valable considération.* Mais, dira-t-on, qu'importe que la résolution soit volontaire ; qu'importe qu'elle soit faite *pour valable considération ?* S'il n'était pas question des droits des tiers, il n'importerait aucunement que la résolution fût volontaire ou forcée, et il n'y aurait pas de question débattue devant les cours ; mais comme il s'agit ici des droits de ceux qui ont été étrangers aux transactions des Intimés, il est important de savoir si ces derniers pouvaient à leur gré disposer des intérêts des tiers et anéantir d'eux-mêmes l'hypothèque de l'Appelant. Si l'on arrivait à l'opinion qu'ils le pouvaient, il resterait à savoir s'ils l'ont fait. L'Appelant soumet les propositions suivantes : 1° Nonobstant la prohibition d'hypothéquer, l'hypothèque était valablement consentie et pouvait légalement exister, tant qu'elle n'était pas détruite et anéantie par les voies légales ; 2° La clause

résolutoire ne peut être exercée volontairement, au préjudice des tiers ; ou, tout au moins, elle ne le peut que dans des cas qui n'existaient pas dans cette instance ; 3° L'acte qui avait transmis la propriété à celui qui avait créé l'hypothèque (Routier), n'a pas été anéanti de manière à entraîner l'extinction des charges créees par Routier durant sa possession. Les autorités suivantes ne laisseront aucun doute sur l'exactitude de ces propositions. L'art. 2125 du Code civil français résume l'ancien droit en ces termes : " Ceux qui n'ont sur l'immeuble qu'un droit suspendu par une condition, ou résoluble dans certains cas, ou sujet à rescision, ne peuvent consentir qu'une hypothèque soumise aux mêmes conditions ou à la même rescision." (1) Ceci implique évidemment que l'hypothèque peut être valablement consentie. Pothier, *Obligations*, n° 224, dit : " Une obligation contractée sous une condition résolutoire est parfaite, dès l'instant du contrat." Donc l'acquéreur sous une condition résolutoire devient propriétaire, dès l'instant du contrat. La condition résolutoire fait cesser le contrat, lorsqu'elle s'accomplit ; mais le fait-elle de plein droit ? Nullement. Il faut assignation devant le juge et faire prononcer la nullité. Pothier, *Oblig.*, No 672, (2) ; Touillier, T. 6, No 548 : " La propriété et la possession de la chose passent sur la tête de celui qui a acquis sous une condition résolutoire." Id., No 550 : " Dans l'ancienne jurisprudence française, on distinguait entre les conditions résolutoires casuelles et les conditions résolutoires potestatives. Les clauses par lesquelles il était convenu qu'un acte demeurerait nul et résolu, dans le cas où l'une des parties n'aurait pas rempli ses obligations, étaient considérées comme simplement comminatoires, etc. Quelles que fussent les expressions dont les contractants s'étaient servis, leur volonté la mieux marquée était impuissante pour opérer la résolution de plein droit." Troplong, *Vente*, No 59 : " A l'égard des conditions résolutoires, on sait qu'elles ne suspendent pas la vente ; le contrat est pur et simple dans son principe et doit recevoir immédiatement son exécution. Seulement *il peut* être résolu, si la condition se vérifie. *Ainsi c'est la résolution seule qui se trouve suspendue.*" Ricard, *Donations*, T. 2, p. 101, No 5 : " La charge ajoutée par le donateur à sa libéralité, a l'effet de révoquer la donation, au cas que la charge ne soit pas accomplie ; *mais elle n'empêche pas que la donation ne soit presentement exécutée.*" Touillier, T. 6, No 526 : " Le débiteur sous condition étant propriétaire de la chose en attendant l'événement, il peut en disposer comme bon lui semble, l'aliéner, l'hypothèquer, etc. Tout ce qu'il fait est valable, si la con-

(1) V. art. 2038 C. C.

(2) V. art. 1088 C. C.

dition vient à défaillir ; mais si elle s'accomplit, tout ce qu'il a fait est anéanti *ab initio*, comme s'il n'y avait pas eu d'aliénation faite, d'hypothèque consentie, parceque le débiteur sous condition n'ayant qu'une propriété résoluble, n'a pu conférer plus de droits qu'il n'en avait lui-même. Pothier, *Traité des Hypothèques*, ch. 3 §-3 : " Pour que l'extinction du droit de propriété de celui qui a constitué les hypothèques, entraîne l'extinction des hypothèques qu'il a constituées, il faut que cette extinction de son droit de propriété arrive *ex causâ antiqua et necessaria*, c'est-à-dire, que dès le temps qu'il a constitué l'hypothèque, son droit de propriété fut résoluble *in aliquem certum casum qui ab ipso non penderet*. Si, au contraire, celui qui a constitué l'hypothèque avait alors un droit de propriété irrévocable, et que son droit n'ait été éteint que par quelque cause nouvelle et *procédante de son fait*, cette extinction de son droit de propriété n'entraînera pas celle des hypothèques qu'il a constituées. *Par exemple*, lorsque le donataire d'un héritage l'a hypothéqué, la révocation de la donation, pour cause d'ingratitude, qui survient depuis, n'éteint pas l'hypothèque." On objectera peut-être que la création de l'hypothèque est ici l'événement résolutoire. Nullement : l'événement résolutoire est *la demande* de la résolution ; attendu que nulle résolution ne s'opère de plein droit, sous notre système. Sous le droit romain même, qui a été adopté par le code, sur cette matière, la résolution ne se faisait de plein droit que lorsque la partie voulait s'en prévaloir. Pothier, *Vente*, No 459 : " il faut que le vendeur veuille user du droit que lui donne ce pacte." Dans cette instance, le vendeur n'a pas songé à se prévaloir du pacte commissoire. Mais voyons s'il l'eût pu de manière à anéantir les hypothèques, au moyen d'une convention volontaire. Pothier, *Vente*, No 329, enseigne que : " Si le contrat avait été exécuté de part et d'autre, la convention par laquelle les parties conviendraient que l'acheteur rétrocéderait au vendeur *pour le même prix* la chose vendue, ne serait pas une résolution du contrat de vente qui a été fait de cette chose ; car il n'y a plus lieu de se désister d'un acte qui est entièrement consommé. C'est pourquoi il sera dû en ce cas un nouveau profit de vente, et l'héritage sera acquêt en la personne du vendeur à qui il a été rétrocédé." Ici, le contrat avait été exécuté de part et d'autre, et dans le cas même où la rétrocession n'eût été faite que pour libérer l'acquéreur de ses obligations futures, ainsi que le jugement l'affirme, en présence d'un acte qui dit le contraire, dans ce cas là même, la rétrocession n'eût pu être une *résolution* du contrat. Mais la rétrocession, dans notre cas, est une véritable vente, faite pour *valable considération*, et le principe de Pothier repousse encore avec plus d'énergie la possibilité de la résolution, à

l'égard des tiers. Loyseau, *Déguerpissement*, Liv. VI, ch. 3, No 6: "Il faut tenir que par le déguerpissement les Hypothèques ne sont point résolues, comme Masuere l'a fort bien décidé, et la coutume de la Marche, art. 180. Et cela est tout notoire en notre usage et pratique. La raison est tirée d'une très belle théorie de Droit, a sçavoir que quand la résolution se fait par une cause nécessaire, alors les Hypothèques contractées depuis le contrat sont résolues; mais quand elle se fait par la volonté de celui qui les a contractées, alors elles ne se peuvent résoudre, afin qu'il ne soit en la puissance du débiteur d'amortir l'hypothèque quand il voudra: qui est la distinction qu'il faut tenir pour générale en tous les cas auxquels cette question peut écheoir." Dans quel cas peut-on dire que le droit de l'acheteur se résout *ex causa antiqua et necessaria?* Pothier, *Cout. d'Orléans*, Titre XX, No 57, le détermine comme suit: "Pour qu'on puisse dire que le droit de l'acheteur se résout *ex causa antiqua et necessaria*, il suffit que *l'action* sur laquelle il est contraint de délaisser l'héritage soit une action à laquelle *aucun fait de l'acheteur intervenu depuis le contrat* n'a donné lieu, mais qui naît d'un vice du contrat tel que l'action rescisoire." Touillier, T. 3, No 682: "Si au lieu d'être résolu par l'évènement d'une condition, ou par l'effet d'une rescision dont la cause est inhérente au contrat, le droit de celui qui a constitué la servitude étant résolu *par le fait de sa volonté*, ou par suite d'un fait imputable à lui seul, les servitudes continueraient d'exister quand même on aurait négligé d'en parler dans l'acte qui a opéré la mutation de propriété. "Le propriétaire ne peut, par un déguerpissement volontaire, priver un tiers d'un droit légitimement acquis." Merlin, *Questions*, vbo *résolution*, § 1: "Ainsi, de même qu'une obligation contractée sous la condition expresse que le débiteur sera maître de l'accomplir ou de la laisser sans exécution, est absolument nulle; de même aussi, on ne peut avoir aucun égard à la dissolution d'une obligation qu'un débiteur voudrait opérer directement par sa volonté seule; et, par conséquent, lorsque la résolution du droit du possesseur d'un héritage est l'effet direct et immédiat de sa volonté, elle ne doit porter aucune atteinte aux charges qu'il a imposées sur cet héritage." Troplong, *Vente*, n° 691, combattant une opinion émise par Duranton et qui s'accorderait avec celle de Fonmaur et de Merlin, dit: "Cette opinion ne me paraît pas admissible. Car je ne puis concevoir qu'une dissolution de contrat convenue par voie de transaction, et pour éviter les frais d'une poursuite, ait des effets autres que la résolution prononcée par jugement; une transaction équivaut à la chose jugée (2055 du code civil). L'opinion de M. Duranton ne devrait être prise en en considération que lorsque les parties dissolvent le contrat

ex causâ voluntariâ; comme il n'y a alors aucune difficulté qui serve de cause à la dissolution, et qu'elle n'a été amenée que par le pur repentir des parties. elle ne peut avoir d'effet rétroactif à l'égard des tiers. Mais, convenons-en cette limitation, bonne dans la théorie, n'est-elle pas illusoire dans la pratique ? Les contractants manqueront-ils de prétextes pour colorer des difficultés et figurer une transaction ? Comment les tiers pourront-il prouver que la résolution s'est opérée *ex causâ voluntariâ ?* " Troplong suppose évidemment que tous ceux qui organisent la fraude possèdent toutes les ressources légales, qui pourraient soustraire leurs conventions à l'action des tribunaux. Cette instance prouve sans équivoque que la limitation admise, par lui-même, n'est pas tout-à-fait illusoire dans la pratique. Il est probable que Hainault et Routier, s'ils eussent été mieux renseignés sur la loi, au lieu de faire une rétrocession pour valable considération, auraient cherché à *colorer des difficultés et à figurer une transaction.* Toullier, t. 12, n° 195, passant en revue les circonstances qui peuvent donner le caractère de propres aux immeubles vendus par l'un des conjoints *avant* le mariage, et qui lui reviennent *après* le mariage, dit : " Le désistement pur et simple consenti par l'acquéreur, qui n'aurait pas encore payé tout ou partie du prix de son acquisition, fait en faveur du conjoint vendeur, n'est encore qu'une résolution de la vente, que le vendeur pourrait faire prononcer en justice, en vertu de l'article 1184. L'héritage ainsi rentré est donc un propre de communauté. Si, au lieu d'un désistement pur et simple, l'acquéreur ne consentait à résoudre son contrat *que moyennant une augmentation de prix, ou à de nouvelles conditions,* ce serait une véritable vente ou une rétrocession, et l'héritage serait conquet." L'Intimé soumit dans son *factum* les propositions suivantes : 1° La vente faite à Routier par l'Intimé n'était pas une vente pure et simple, c'était un acte qui participait de la donation, il contenait une libéralité au profit de Routier ; 2° l'Intimé était en loi bien fondé à imposer à Routier les conditions sous lesquelles celui-ci a reçu son immeuble ; 3° Routier ayant reçu l'immeuble en question sous prohibition de l'aliéner et de l'hypothèquer sous peine d'en être privé, au cas de contravention, n'a pu valablement l'hypothéquer au profit de l'Appelant, et l'hypothèque qu'il lui a accordée, ne peut avoir d'effet légal ; 4° Routier ayant hypothéqué le bien dont il s'agit, contrairement aux conditions sous lesquelles il l'avait reçu de l'Intimé, ce dernier est devenu bien fondé à rentrer dans ce bien, et pour y parvenir il n'était pas tenu de se pourvoir par action, il était bien fondé à le reprendre par rétrocession, comme il l'a fait. L'Intimé appuyait ces propositions des autorités suivantes : Merlin, *Questions de droit,* vbo *Réso-*

lution, § 1 ; Idem, *Répertoire*, vbo *Déguerpissement*, § 9 ; Toullier, t. 6, n° 488; Bourjon, t. 2, pp. 150, 151; Furgole, t. 2, pp. 479, 480, 481 ; Domat, liv. 1er, t. 10, sec. 1re, § 10 et 11.

JUGEMENT : " Considering that there is no error in the judgment appealed from, doth affirm the same with costs. (Judge C. MONDELET dissenting.) " (5 *J.*, p. 306.)

M. BRANCHAUD, pour l'Appelant.

DOUTRE et DAOUST, Conseils de l'Appelant.

LEBLANC et CASSIDY, pour l'Intimé.

HYPOTHEC.—RAILWAY.—SHERIFF'S SALE.—SEQUESTRE.

SUPERIOR COURT, Montreal, 27th November, 1861.

Coram MONK, J.

MORRISON *vs.* THE GRAND TRUNK RAILWAY COMPANY OF CANADA.

Held : 1st. That the Province of Canada had, under the Statutes, the first *hypothèque* upon the Grand Trunk Railway for £3.111.500 sterling.

2nd. That the 1st preference Bondholders are subrogated in this first *hypothèque*, to the extent of £2.000.000.

3rd. That notwithstanding these *dicta* the court will not declare the road to be so hypothecated.

4th. That, under the issues it is not competent for the court to declare that the road cannot be sold at Sheriff's sale.

5th. That the court has not power to appoint a séquestre or receiver to the Railway.

6th. That the law regarding sequestration of property does not extend to the judicial sequestration of the property of bodies corporate.

MONK, J : Plaintiff, by his Petition, sets up : That, under and by virtue of the following enactments, 12th Vic., cap. 29, sec. 1 ; 14th and 15th Vic., cap. 73, secs. 22 and 24 ; 16th Vic., c. 39, sec. 4; 18th Vic., cap. 33, sec. 20; 18th Vic., cap. 174, sec. 1, NOS. 2 and 3, the Province had, prior to 1856, the first charge, hypothec, mortgage and lien upon the Grand Trunk Railway, and all property, real and personal, belonging to it, including rolling stock, to the amount of £3,111,500 sterling; that, under the Act 19th and 20th Vic., cap. 111, (1856) the Company issued Preferential Bonds, to the amount of £2,000,000 ; " the holders of such bonds to have priority of claim, therefor, over the present first lien of the Province ; " that such preferential bondholders acquired the same charge, hypothec, mortgage and lien as was held by the Province prior to the Act of 1856; that Plaintiff became the purchaser of preferential bonds, to the amount of £10,000 sterling, the remainder of the bonds being outstanding in the hands of a large number of persons, many of them unknown to Plaintiff; that the

Company is in embarrassed circumstances and largely indebted; and the rents, revenues, tolls and income of the railway, instead of being employed in payment of interest on the said first preference bonds, are used for the payment of unprivileged debts, and that judgments to a large amount have been obtained against the Company for debts posterior in privilege to that of Plaintiff, and that he is exposed to the loss of his debt and security; that the half-yearly interest on the first preference bonds of Plaintiff, which became due on the 1st July, 1860, and 1st January of 1861, remains unpaid, and one-half year's interest on the whole £2,000,000 sterling; that these Preferential Bonds constitute a first privileged debt, with a right of hypothèque and mortgage and priority of claim, having a preference over all the other creditors of the Company, with a charge and lien upon the Railway and the profits and tolls thereof, and the lands and real estate of the Company, and upon the engines, carriages and other rolling stock, plant and all other tangible personal property of the company; that the security of the first preference bondholders rests mainly on the efficient working and maintenance of the railway, and on the proper management and collection of the tolls and revenues of the same; and that their security, as well as that of all other the creditors of the Company, whose claims amount in the aggregate to £10,000,000 sterling, would be greatly impaired by the sale or by the taking in execution of the rolling stock and plant of the Company, or by any stoppage of the working of the railway; that the rolling stock, plant and moveables of the company are in law *immeubles par destination*, and cannot by law be sold in the ordinary way as moveables, and cannot be separated from the road; and that the road and immoveable property cannot be sold at Sheriff's sale nor by partial sales of separate portions of the road; that Plaintiff is entitled to take proceedings to prevent the sale of the road and rolling stock, and to have his rights settled and protected by the court, and his interest paid by preference, out of the tolls, profits and revenues of the railway, after deduction of working expenses, and to have a *Séquestre* or Receiver appointed to work and manage said road and receive, collect and pay over the tolls, profits and revenues for the benefit of Plaintiff, and the preferential and other creditors, according to their respective rank. And Plaintiff prays: 1° That it be declared that he, as a preferential bondholder, is entitled to a first hypothèque, mortgage and lien on the railway, tolls and property of the company, and also upon all viaducts, bridges, station-houses, depots and other works, machinery, engines, vessels, carriages and things of every kind belonging to the

company and to have the railway and rolling stock and plant worked and used for the benefit of Plaintiff and the other first preferential creditors of the company and the rents, tolls profits and revenues after deducting working expenses, applied to payment of the said interest and other debts of the several classes of creditors according to their rank; 2° that judgment be rendered in favor of Plaintiff for £636 stg. for overdue interest on his bonds; 3° that it be declared that the railway, rolling stock, and plant cannot and ought not to be sold at Sheriff's sale and the creditors forced to rank upon the proceeds in the ordinary manner; 4° that the court do name a *Séquestre* or Receiver, by whom the railway may be worked, and the tolls, revenues and profits received and the same and net profits thereof be returned into this court or be applied and distributed in conformity which such orders as may from time to time be given by the court, in satisfaction of the said overdue interest and other debts and demands, due by the company, and that such *Séquestre* or Receiver be held and declared to be subject to the order of the court, and to render all proper accounts. Defendants' plea is *a défense au fond en fait.* The evidence of Plaintiff consists of a number of *coupons* fyled; a copy of the amalgamation agreement; copies of judgments against the company; the depositions of Elliott, Secretary, and Hardman, Auditor of the Company, by which certain statements in the Report of the Commissioners, and the answers of Defendants to Interrogatories *sur faits et articles.* This evidence establishes the following facts: 1st. That Plaintiff is the holder of *coupons* of first preference bonds, to the amount of £312 sterling; 2nd. That several large judgments have been rendered against the Company, and that it is embarrassed and unable, out of available revenue, to pay the interest upon its bonds; and 3rd. that the liabilities of the Company are large and the receipts not more than sufficient to pay working expenses. There is no proof that Plaintiff is the holder of any bonds, nor any conclusive evidence that the Company is insolvent. The first question to be considered, is whether Plaintiff, assuming that he is a first prefence Bondholder, has or has not, the right to have it judicially declared and adjudged by this court that he is entitled to a first *hypothèque*, mortgage and lien on the Railway, tolls and property of the Company, and also upon all viaducs, bridges, station-houses, depots and other works, machinery, engines, vessels, carriages and things of every kind belonging to the Company, and to have the Railway rolling stock and plant worked and used for the benefit of Plaintiff and the other preferential creditors of the Company, and the rents, tolls, profits and revenues, after

deducting working expenses applied to the payment of the interest and other debts of the several classes of creditors according to their rank. Previous to the passing of the Statute of 1856, the Province had, under the several Guarantees set forth in various Statutes, advanced to the Grand Trunk Railway Company the sum of £3,111,500 stg., for which the Crown undoubtedly held "the first hypothec, mortgage and "lien upon the road, tolls and property of the Company." That is, as I apprehend, "upon all viaducts, bridges, sta-"tions, houses, depots, and other works, machinery and "engines, vessels, carriages, and things of every kind which "may be necessary or convenient to the working or using "of any Railway," and upon all tolls arising therefrom. The hypothec, mortgage, privilege or lien of the Province extended to all these objects, and the Provincial Government held, by express legislative enactment, these various securities for the payment of the different loans and advances which it had from time to time made to the Company. We may now enquire whether the first preference Bondholders have a claim upon the "Railway" as above defined, and also upon the tolls, superior to this hypothec and mortgage, privilege or lien of the Province. I am of opinion that the question is susceptible of very little difficulty. The Act 19 and 20 Vict., cap. 110, expressly enacts "that the said company shall be authorised "to issue Preferential Bonds, to the extent of £2,000,000 stg. "The holders of such bonds to have priority of claim therefor "over the present first lien of the Province." In strict legal technically, we may be at some loss to define or classify this subtitution of one creditor in the rights of another. If desirous to find a name for it, we might have some doubts whether we should term it, a surrender, transfer, assignment, renunciation, subrogation, or merely a simple postponement; but the language devoid of technical accuracy in this respect is unambiguous, and, to my mind its effets is clearly beyond controversy assuming always that there is nothing in the form and language of these First Preference Bonds at variance with this enactment; and, upon reference to the form of preferential bond given in Plaintiff's Petition, (and its correctness is not disputed by Defendants) we find these words: "The holder of this Bond is entitled, by the Act of "1856, under the authority whereof it is issued to *priority* "of claim therefor over the existing *first lien* of the Province "upon the undertaking of the Grand Trunk Railway Compa-"ny of Canada, *in respect of the debt of the Company to the* "*Province.*" This act then places, as I apprehend, the first preference Bond-holders in precisely the same position, in regard to "the Railway," and its tolls and property, as that

previously held by the Province of Canada. If these Bond-holders have not the "first lien," the Province has; the contest for priority could only arise between the Government of Canada and the first preference Bond-holders; and with this enactment before it, no Court of Justice would probably hesitate to declare that Canada has given to the Bond-holders by express legislative enactment, a "priority of claim" for their Bonds over the "first lien" of the Province, and I am of opinion that this privilege is applicable to both Capital and Interest. By the Act of 1856, the Province in effect subrogated these Bond-Holders in all the rights resulting from its "first lien" to the extent of £2,000,000. By the Act of 1857, it *foregoes* on certain conditions, *all interest* on its claim of £3,111,500 stg., against the Company, until the *earnings and profits* of the Company shall be sufficient to defray certain charges therein specified, and, among these charges, is the interest of the first preference Bonds. If the Acts of 1856 and 1857 are to be interpreted together, the interpretation, I think, would be in favour of the first preference Bond-holders. I do not therefore view this as a contingent or conditional right, conceded to these Bond-holders, but a privilege, a "first lien" to the extent of £2,000,000 stg., as clear, as absolute, and as indefeasible as that held by the Province of Canada itself previous to the act of 1856. Regarding this question as one of strict law disposing of it by a rigid interpretation of a positive enactment, and wholly irrespective of the various considerations of equity and good faith, which naturally arise in connection with this subject, I can come to no other than this conclusion in regard to the privilege and priority of claim, contended for by Plaintiff. The act of 1858, 22 Vic., ch. 52, amends the Acts relating to the Grand Trunk Company, and provides for the increase of its capital, by preferential bonds which should be deemed preferential bonds under the Act of 1856, or by other bonds not preferential or by mortgage, or by the issue of new shares. "Provided "always (sect. 3) that nothing herein or hereinafter con-"tained, shall in any way alter affect, postpone or prejudice "the claim of the Province upon the said undertaking, or "the obligations of the Company towards the Province as "settled by the provisions of the several Acts in force "relating to the said Company." I am further of opinion that this Act does not in any way affect the rights of the first preference Bond-holders. It is expressly declared that this Act shall not in any way alter or affect the claim of the Province, or the obligation of the Company towards the Province, as settled by the provisions of the several Acts then in force relating to the said Company. All the

provisions of the previous Acts are left entire and in full effect and operation, and among others, those of the act of 1856; hence the guarantee therein secured to the first preference Bond-holders, is in my opinion untouched and undiminished directly or indirectly. But, assuming this view of the law to be correct, is it the duty or is it strictly within the competency of this Court, according to our mode of proceeding formally and judicially to enunciate a theoretical opinion on this subject? Is it proper that I should, looking carefully into the facts of this case, embody such an adjudication in the judgment I am about to render? I think not, and for very many obvious reasons, founded not only upon principles of procedure but of law. It will be seen that I have deemed it my duty to offer the proceeding remarks *obiter dicente*, respecting the rights of these first preference Bond-holders, in order that the parties to this cause may understand, that in my opinion it is not by reason of any doubt I entertain in regard to the nature and extent of Plaintiff's rights, abstractedly speaking, but owing to the impossibility under circumstances of this case, of the Court granting the particular remedy he seeks, that I am forced to refrain from granting the more important conclusion of his petition. Inverting slightly the order of Petitioner's conclusions, passing for the present over the 2nd head of his prayer and taking up the third. In reference to this branch of the law, it was contended, at great length, by Mr. Robertson, one of the learned counsel for Plaintiff that the remedy by Sheriff's sale could not reasonably be applied to railroads, even if railroads could be sold by the Sheriff, for it was evident that purchasers (*adjudicataires*) could not be found for such undertakings, especially for such a road as the "Grand Trunk." The interest of all classes of creditors would be sacrificed; the Company would practically be dissolved and public and private interests destroyed and the just expectations of creditors in this country and at home, founded on the good faith of the Province, be frustrated. It was true that, by the course of practice, in our Courts, in ordinary cases, *hypothecary* creditors must look after their own interest, and bid up the property hypothecated at Sheriff's sale, and afterwards fyle their opposition *à fin de conserver* on the moneys when returned into Court. So with creditors having a privilege on moveables, as the landlord for rent, his former right to stop the sale by opposition having been converted into an opposition *à fin de conserver*. A *créancier chirographaire* may sell the immoveable property of his debtor, no matter how many hypothecs might attach to it, and the Sheriff's sale purged all *hypothèques*. Since the recent statute, 23 Vic., ch. 59, consolidated Statutes, L. C., p. 339,) opposition *à fin de conserver*

need not be filed, inasmuch as the Sheriff obtains from the Registrar a certificate of all hypothecs for ten years previous to the sale, and returns it into Court with the moneys, so that the debts as well as the rank of the *hypothecary* creditors may be determined on by the Court. Thus any creditor who obtained a judgment might bring the debtor's property to sale. If an immoveable could be sold in parts, a creditor for ten pounds might bring to sale property worth thousands. If we have only the ordinary remedy by Sheriff's sale, the preferential creditors must stand by and see their security taken from them by judgment creditors having no pretence to privilege or lien; or must buy off the judgment creditors, in fact pay all the floating debt of the Company. This could not have been contemplated by the statutes, which in giving a "privilege" must be held as impliedly giving a remedy to render such "privilege" effectual. But, after mature deliberation, I find myself compelled to declare that I am decidedly against Plaintiff upon this point. There would probably be no great temerity on the part of any individual or of any tribunal in asserting that the disposal of the Grand Trunk Railway by Sheriff's sale, either in whole or in part, must be held in the present state of our law a practical impossibility. No doubt such a proceeding would lead to many of the disastrous consequences so clearly pointed out by Plaintiff's counsel, but I am bound to take the law as I find it, and, in seeking to apply and enforce its dispositions, I must not defeat, but undeavour to execute it, according to the meaning of the Legislature, and in conformity with the settled practice of this Court. I am therefore of opinion that, under the issue presented for my consideration in this cause, I have no authority to render a judgment granting the above conclusion and prayer of petitioner. I do not consider it within the attributes of this court to render a judgment condemning Defendants to pay to Plaintiff a certain sum of money, as in a personal action, and, at the same time, to declare that the judgment of the court cannot by law be enforced in the usual way, and this would practically be the effect of a decision such as that sought by Petitioner here. Apart from the manifest and direct excess of jurisdiction which such a judgment would involve, it would lead to no useful or final result I need offer no opinion upon the question which was argued so elaborately and with such ability and learning whether the rolling stock and plant of the company be or be not *immeubles par destination*, tho' it would not perhaps be difficult to show that, according to our law, as we have it from old France, Plaintiff's pretention in this respect is unfounded. Nor shall I formally decide whether the Grand Trunk Railway and property of the company can

or cannot be sold in whole or in part by Sheriff's sale. It is not necessary that I should give any opinion upon these points. It may be scarcely necessary to remind the experienced counsel engaged in this case, that, according to the mode of procedure adopted before this court, an adjudication such as that prayed for here could only be rendered upon an opposition *à fin d'annuler*, upon a petition *en nullité de décret*, or upon some proceeding equivalent or analogous to these, and not *a priori* as prayed for by petitioner This part of Plaintiff's conclusions is therefore overruled. I proceed now to consider the position submitted, whether this court has the power to name a *séquestre* or receiver to the Grand Trunk Railway Company, and, if so, whether, in this instance, the court has good and sufficient grounds for the nomination of such an officer; whether the proof of record would justify the court in the exercise of such authority? On the part of Plaintiff it was contended in argument that the road was inalienable, that the ordinary remedy which creditors had against the estate of their debtors could not enure to Plaintiff, who was entitled to another remedy at the hands of the court, and reference was made to Feraud-Giraud, *Législation des Chemins de Fer*, nos. 13, 14, 17 et 21; Redfield, on *Railways*, p. 579, 589, 590, et 591; Dalloz, *Recueil Périodique*, 1851, part 3, p. 49 et 50; Dalloz, *Recueil Périodique*, 1851, part. 5, p. 78, No. 8, case of the chemin de fer de Sceaux: "Attendu que, par leur nature de voie publique les chemins de fer ne sont point susceptibles d'une propriété privée; Qu'il est impossible, en effet, d'admettre qu'une telle voie, créée pour l'utilité de tous, puisse être soumise aux modifications qui résultent de ventes, donations, expropriations, &c.; Que la destruction de la moindre parcelle d'un chemin de fer détruirait la totalité de la voie, ce qui serait dans la plus évidente opposition avec la création même du chemin," &c. It is so with canals: "Attendu que ces sortes d'établissements étant placés dans le domaine public sont naturellement inaliénables et imprescriptibles, tant que la destination du fonds n'a pas été légalement changée." Proudhon, *Domaine Public*, t. 3, p. 146, 147. 4° As to the appointment of a *séquestre*, which was demanded by Plaintiff, the old French law did not specify the cases where such an officer should be appointed. It was left to the discretion of the judge. Ordinance of 1667, tit. 19, art. 1. The modern Code, art. 1961, specified three classes of cases in which a *séquestre* might be appointed, but the opinion of the best commentators was, that even the code did not restrict the appointment to these cases. 3 Delvincourt, p. 436, No. 4: "L'article 1961, n'est pas restrictif; la cour peut ordonner le séquestre chaque fois qu'elle le juge convenable pour la sureté des parties ou la décision de la cause." The rules

laid down in the code about the *séquestre* do not deviate from those followed before the code, as shewn by the discussion of the code in 15 Locré, p. 122, where it is said: " Dans une matière où les principes sont posés depuis longtemps, il s'agit non de créer des règles, mais de les recueillir." And, at p. 141, Favard says: " Vous n'avez remarqué aucune disposition nouvelle, les lois anciennes sur la matière sont l'expression de la morale publique." Under the application of these rules, numerous cases of the appointment of a *séquestre* were to be found both before and since the code. Troplong, " *Du dépot et du séquestre,*" No. 267; Dalloz, *Recueil Périodique*, 1834, part 2, p. 101, where a *séquestre* was appointed to the seizure of real and personal estate, and only maintained in appeal to the real estate and the *immeubles par destination.* 9 Poullain Duparc, p.p. 160, 164; Dalloz, *Recueil Périodique.* 1849, part 4, p. 47. Order, placing a railroad from Paris to Sceaux under a *séquestre,* Dalloz, *Recueil Périodique*, 1852, part 1, page 272. Judgment, showing the effect of the appointment of a *séquestre* of the railroad from Marseille to Avignon, with regard to the possession of the company. 1 Teulet, p. 620, No. 26; " Le séquestre judiciaire d'un immeuble peut être nommé sur la demande des créanciers inscrits, surtout lorsque l'immeuble se trouve entre les mains d'un tiers, à titre d'antichrèse. En ce cas, les créanciers ont le droit de reclamer le séquestre soit pour la conservation de leur gage, soit pour que les revenus soient perçus dans leur intérêt." J. Pal., Bourges, 8 mars, 1822; 5 Dalloz, *Jurisprudence du Royaume*, vo. *Dépot and séquestre*, p. 78. Several cases were then cited in which *séquestres* had been appointed by the courts in the district of Montreal. The first was that of *Des Rivières* vs. *Ayer*, No. 1206, judgment of 6th April, 1825, and 20th Feb., 1826. In this case, a *séquestre* was appointed to take possession of a land claimed by a petitory action, so that no waste should be committed pending the action by the Defendant, who was nevertheless maintained in the possession of a mill erected on the property. *Fabre dit Montferrant* vs. *Chevalier.* Judgment rendered in May 1845. Where, on the suggestion of experts named in the case, a *séquestre* was appointed with special power to lease the property of which the Defendant had only the usufruct, and to hand over a portion of the proceeds to the Plaintiff in deduction of her claim, and the remainder to the Defendant for his support. *Hart* vs. *Molson*, 27th May, 1851, was then cited, where a *séquestre* was named to receive an estate given up by executors, and to sell the property and carry out the provisions of the will. The power of the court to grand the remedy sought for by Plaintiff was indisputable. The Superior Court had all the judicial powers of the old french courts,

namely of the Conseil Supérieur de Québec. It was bound to render such judgments between the parties as would meet the justice and equity of the case; it was not bound to any particular form of remedy as could be seen by a passage from Argou, which was cited. In the case before the court, it was submitted that, from the nature, extent and situation of the property of Defendants, as from the various public and private interests connected with it, the remedy sought for should be granted. The ordinary remedy of selling the property at sheriff's sale could not be applied; if it were, it would result in the utter ruin of all interests concerned. The appointment of a *séquestre*, the powers and duties of whom would be similar to those of a receiver in England, was the only adequate remedy which could be applied. It would protect the rights of all parties, secure the proceeds of the road to the creditors entitled to them, and carry out the intention of the legislature. On the other hand, Defendants contended, upon the following arguments and authorities, that no such officer as a *séquestre* or receiver could be named by this court to the Grand Trunk Railway Compagny: " Le *séquestre* est une personne choisie " par le juge, ou d'office, ou sur la nomination des parties, pour " régir et gouverner *une chose contentieuse*, et pour en per- " cevoir les fruits et revenus, lorsqu'elle consiste en quelque " jouissance, jusqu'à ce qu'il ait été règlé à qui cette chose doit " appartenir." 1 Jousse, *Sur l'ordonnance*, 1667, t. 19, *Introduction.*" Bornier defines the *séquestre* to be " un commission- " naire convenue par les parties, ou nommé d'office par le juge, " pour régir et gouverner les choses, *pendant le procès.*" *Ancien Dénisart*, vbo *Séquestre.*" *Séquestre.* Ce mot se dit, tant " de la consignation *d'une chose litigieuse*, en main tierce, " pour la conserver à qui elle appartient que de la per- " sonne même à laquelle le dépot est confié." Cuyot, *Répertoire* vbo *Séquestre.*" Le séquestre, ou la séquestration, est la remise " qui est faite, en vertu d'un jugement à une tierce personne, " *de la possession d'un héritage contesté entre deux parties,* " ou commun entr'elles, *à la charge de le restituer à celle des* " *deux parties à qui* le juge ordonnera qu'il soit restitué." Pothier, *Proc. civile*, ch. 3, art. 2. § 1, p. 108; 9 Poullain du Parc, p. 160." Le séquestre judiciaire est le dépot *d'une* " *chose litigieuse* ordonné par justice," 3 Zachariæ, p. 119." Le " caractère distinctif du séquestre, c'est que la chose qui en est " l'objet soit litigieuse," 6 Duvergier, p. 585." Le séquestre " judiciaire suppose, dans l'exactitude du mot, que la chose " mise en dépot par autorité de justice est litigieuse," Troplong, p. 205. " *Il suppose nécessairement une* contestation sur une " chose dont la propriété ou la possession est disputée par deux " ou plusieurs personnes. C'est pourquoi Noodt disait: *Seques-*

" *tratio est depositum rei non cujusque, sed litigiosæ,*" Troplong, *Déposition et séquestration*, n° 248. Judicial sequestration was only ordered in old France, upon the requisition of parties, in cases where the proprietorship or possession of real property was in dispute." C'est dans les matières possessoires " qu'il y a plus ordinairement lieu au séquestre ; par exemple, " si, après l'instruction de la complainte, le juge trouve que " l'une des parties n'a plus prouvé sa possession que l'autre, " il ordonne que les parties instruiront au pétitoire, et qu'en " attendant la possession sera séquestrée ; le séquestre est " en ce cas ordonné d'office. Quelquefois le juge l'ordonne sur " la demande de l'une des parties comme sur une complainte, " lorsque lorsque le procès peut être long. Tit. 19, art. 2. On " ordonne aussi quelquefois le séquestre sur la demande de " l'une des parties en matière de partage de succession ou " de communauté; en attendant que le partage soit fait, " lorsqu'il y a des contestations qui le retardent, et pour " prévenir celles que la jouissance par indivis pourrait cau- " ser. Pothier, *Proc. civile*, ch. 3, art. 2, § 1, p. 108. Les " séquestres ne peuvent être nommés qu'en connaissance " de cause, et lorsqu'il ne parait pas laquelle des parties a le " droit ou la possession la plus apparente. Claude LeBrun, en " son livre des *Procès civils et criminels*, liv. 3, apporte quatre " cas auxquels on ordonne communement le séquestre ; le pre- " mier, si les preuves des parties sont égales ; le second, s'il " est question de la possession d'une hérédité qui consiste en " meubles précieux et de grande valeur ; le troisième, s'il s'agit " de la possession d'un bénéfice, dont les fruits sont tels que l'une " ni l'autre des parties n'est capable d'en répondre; le quatrième, " s'il y a lieu à craindre que les parties n'en viennent aux mains " pour la levée des fruits, ou jouissance de la chose contentieuse," Idem, p. 109." On l'ordonne (the sequestre) à la réquisition des " parties, lorsqu'il y a plusieurs prétendants droit à la propriété " d'une chose, sans que l'un ni l'autre ait la possession annale " en sa faveur. Guyot, *Répertoire*, vbo *Séquestre*. Le *séquestre* " n'a lieu que quand il y a débat et contestation entre les par- " ties, *touchant la chose qu'on donne en garde*, Ferrière, *Dic- " tionnaire de droit*, vbo *Séquestre*, p. 916. Si le détenteur " d'un immeuble réclamé le dégradait, après la demande, pour " préjudicier au réclamant, celui-ci pourrait faire les actes " nécessaires pour l'en empêcher, v. g., demander que l'immeuble " séquestré, etc." Pigeau, *Proc. civile*, liv. 2, part. 1, t. 2, ch. 4, p. 114, also p. 170 : " Tel est celui ou un homme contre " qui l'on réclame un bien, le dégrade : on ordonne le séquestre " de ce bien *en attendant la décision de la contestation*." Id, liv. 2, part. 3, t. 2, ch. 2, p. 387 : " Le juge ne peut ordonner le " séquestre que dans les circonstances *où la loi l'y autorise*

"*formellement.*" 3 Zachariæ, p. 119 note 2 : " Le séquestre " ne doit être ordonné *que pour cause de nécessité absolue,* " car il en résulte toujours *une atteinte portée au droit de* " *propriété ou de possession.*" Teulet, *Codes français,* art. 1961, p. 620 : " La nomination d'un Séquestre judiciaire n'a lieu " qu'en cas de litige." Dalloz, R. P., (1825), part. 3, p. 830 ; Id. (1827), part 2, p. 105 : " Il n'y a pas lieu au Séquestre autorisé " par l'article 1961, Code Civil, lorsqu'il n'existe plus de litige " etc." ; Id. (1851) part 1, p. 269, also p. 272. " The remedy of " sequestration, being a rigorous one, cannot be extended by " implication to cases not contemplated by the law-maker." 9 Louisiana An. Rep. p. 536 : " Sequestration and other conser- " vatory remedies by which the property of a party is wrested " from his possession and taken into the custody of the law " before judgment etc., are extraordinary and rigorous, and " hence the doctrine has been uniform that they are to be " strictly observed that the requisite of law must be observed " of pain of nullity." Id. vol. 4, p. 456 : " A sequestration will " be allowed *only when the party is clearly entitled to it.*" Id. vol. 2, p. 961. If the remedy of Sequestration had been applicable under the old French law to the property of a Corporation at the instance of an hypothecary creditor, some cases in which it had been made available would doubtless be found in books, for although the Railway are modern inventions, Corporations, Commercial, Literary and Religious were always well known. No such case had been cited and the cases in which the *Séquestre* was accustomed to be ordered bear no analogy to the present. Under the modern French code, there are three cases in which a *Séquestre* may be named : La justice peut ordonner le séquestre : 1. Des meubles saisis sur un débiteur ; 2. D'un immeuble ou d'une chose mobilière dont la propriété ou la possession est litigieuse ; 3. Des choses qu'un débiteur offre pour sa libération. The second case is " à proprement parler le cas du *Séquestre judiciaire.*" Troplong, *Dépot and Séquestre,* n^s 288-289. The authors are divided in opinion as to whether this article is to be taken as *limitatif* or merely *indicatif.* Delvincourt is of opinion that it is not *restrictif,* while Dalloz and Troplong are of a contrary opinion. (Delvincourt, code annoté, p. 1, and Troplong, *Dep. and Séquestre,* p. 206 and seq.) Whichever of these opinions may be entitled to the most respect, it was certain that the courts in modern France have never extended the remedy of Sequestration to the property of Corporations. It is true that Railways have been put *sous Séquestre,* but it has invariably been done *by the direct decree of the Government,* no doubt under the sanction of Legislative enactments. Some cases of the Sequestration of Railway pro-

perty in France were cited by Plaintiff's counsel, in support of their argument that the Courts of Lower Canada have a right to sequestrate the property of Corporations at the instance of hypothecary creditors, but it was contended by Defendant's Counsel that these cases far from establishing such a doctrine go to show that in France Legislative or Executive action is necessary to the attainment of such an object. The instances of the sequestration of railways in modern France are the following as found in the *Recueil Périodique* de Dalloz: The Railway, Bordeaux la Teste; (1848) part 4, p. 192. The Railway, Marseille to Avignon, part (1849) 4, p. 2, both sequestrated *by the Government* as is evident from the commencement of the *Arrêts* or Decrees ordering the Sequestration, which is as follows: Le Président du conseil chargé du pouvoir exécutif, etc. The Sequestration of this latter railway is referred to by the *Cour de Cassassion* as having been the act of the Government, Dalloz, R. P. (1852) p. 272. The other instance is the Sequestration of the Railway from Paris to Sceaux (cited by Plaintiff's Counsel). This was also the direct act of the Government, the Decree commencing "Le Président de la République, etc." Dalloz, R. P. (1849) part 4, p. 47. Besides, in all these cases, the Sequestrations were ordered at the express instance and request of the Railway Company and not against their will. No autority to the contrary having been cited by Plaintiff's Counsel, Defendants contended that the judicial Sequestration of the property of a Corporation at the instance of an hypothecary creditor is unknown, both to the law of Lower Canada and to the law of modern France. As to the powers of this court, it was argued that the jurisdiction of the Superior Court over bodies politic and corporate within Lower Canada is given by the 4th section of Cap. 78, Consol. Stat. of Lower Lower Canada, (p. 667) which provides that such bodies "shall "be subject to the superintending and reforming power, order "and control of the Superior Court and of the Judges thereof, "*in such sort, manner and form as by-law provided.*" The legal remedies here contemplated in respect of Corporations are "provided" by the 88th Chapter of the Consolidated Statutes of L. C. (p. 821). The remedy of *Mandamus* is given by Section 11. The writ of Prohibition is provided for by Section 1 of Cap. 89. In case a Corporation has forfeited its rights, privileges and franchises, by the judgment declaring such forfeiture, a Curator is to be appointed to the property of the Corporation. (Cap. 88, Sec. 10.) The extraordinary remedy of a *Séquestre* is nowhere spoken of and it is not "by law provided" as applicable to the property of a Corporation which has not been ousted of its corporate rights. Plaintiff, it

was said, had entirely failed to show that any necessity existed for the application of the harsh and extraordinary remedy which he asks in praying for a *Séquestre*. If he had succeeded in making good his right in law to that part of his conclusion, it would still have been incumbent upon him to prove a state of facts imperatively calling for the appointment of a *Séquestre* or receiver, and that such nomination would be a substantial benefit to all parties interested in the Railway as creditors, or at all events to the preferential creditors. This might perhaps have been inferred had any thing like mismanagement, want of economy or mis-application of earnings been shewn on the part of the Directors and Officers by law entrusted with the management of the Railway. It was submitted that nothing of the kind had been established in evidence. Mere failure of profits out of which to pay interest is no ground for the naming of a receiver. (Redfield, p. 591, *note*). The nomination of a *Séquestre* under our law, as well as that of a Receiver under the English law, is left, in cases where the law allows such a remedy, to the discretion of the Court. (Merlin, Vo. *Séquestre*, note; Story's Eq. *Jur.* p. 159.) In this case, the fact that the Railway extends into several different jurisdictions is an insuperable objection to the nomination of a *Séquestre*. The Defendants moreover contended that it was not shewn that economy and good management would be promoted by a sudden and entire change in the administration of the affairs of the Company. Indeed, it required little argument to demonstrate that such a change would be disastrous to the interest of all classes of creditors, and would lead to a stoppage of the road; besides, that, the application of the remedy sought by Plaintiff could only be efficiently applied by Courts very differently constituted from the Courts of Lower Canada and sitting (as the Court of Chancery) every day. As to the powers and authority of the Court, we find, upon reference to the old jurisprudence of France, and also to the code, that there were certain limits to the discretionary or equitable authority of the Court. It will be remarked that, in this case, it is a judicial sequestration that is sought at the hands of the Court. Now, however elastic the principles of our law may be, I cannot extend this equitable power of sequestration to cases other than those laid down in the law. This is the limit, and I must confine the exereise of my authority within that limit. In a certain defined class of cases between private individuals, a discretion is given to the Courts of law of Lower Canada to sequestrate litigious property, these are cases where the right of property or possession is in litigation, and where the right of one party is not more apparent than that of the other. I am

of opinion that no man's property, of which neither the right of ownership nor that of possession is disputed, can be sequestrated by any authority, equitable, or otherwise, legally competent to this Court. "*Sequestratio est depositum rei, non cujusque, sed litigiosæ.*" The ordinance of 1667, t. 19, Art. 2, it is quite true, declares: "Que les Séquestres pourront être ordonnés d'office, en cas que les juges estiment "*qu'il y a nécessité* de le faire," but the best authorities go to show that it was only in a particular class of cases, the tribunals of old France assumed exercise of this power of Sequestration, and these are the cases referred to above and specifically mentioned in the several authorities cited by Defendant's Counsel from the old law of France. Troplong says: "D'après le droit du "moyen âge, à cette rude époque où la force dominait la so-"ciété et où les querelles des particuliers se vidaient les armes "à la main, la justice avait introduit un usage protecteur de "la paix publique: c'était de mettre avant tout sous la main "du roi la chose sur laquelle il y avait débat. Par cela seul "qu'il y avait contestation, il y avait nécessairement séquestre. "Vers le milieu du seizième siècle, l'empire de la force avait "cessé; la France obéissait aux lois, et le parlement crut "devoir abolir sans inconvénient une formalité de procédure "qu'une société régulière rendait inutile. Le séquestre judi-"ciaire resta cependant, mais comme remède subordonné aux "circonstances et dont le juge ne devait user qu'en connais-"sance de cause." And, he adds, apparently referring to the old as well as to the new law of France. "Le cas du séquestre "judiciaire, à proprement parler, est celui où la justice ordonne "de mettre sous le séquestre un immeuble ou une chose mo-"bilière dont la propriété ou la possession est litigieuse entre "deux ou plusieurs personnes. Quand les preuves des premières "sont incertaines (disent les règles de l'ancien droit français) "ou y a crainte que l'on ne vienne aux mains, la complainte "est fournie, et les *choses contentieuses séquestrées.* Séquestre "garde; et la main de justice ne dessaisit et ne préjudicie à "personne." *Manus regis, vel judicis, non privat aliquem possessione sua,* is the maxim of the law, and could scarcely apply when the right of possession was undoubted, or if the right of property was not in controversy. Not only must the case be one in which the exercise of this discretionary authority is recognised and sanctioned by law, and the practice of the court, but it must be one of stringent and manifest necessity, and for the undoubted advantage of all parties before the court, and interested in the litigation. We shall see presently whether it has been proved that any such necessity exists in this case, or whether any advantage would result to the parties by the nomination of a *séquestre* or a receiver.

This power is conceded not to supersede or violate the positive legislation of the land, but as instrumental in enforcing it, in cases where the ordinary course of litigation would lead to the ruin or serious injury of the parties or inevitably occasion detriment to the property or interest in litigation. In other words, the private property in dispute between litigants, may for the mutual advantage of all parties interested and during the time of the litigation be placed under the authority and control of an officer of the court, who shall be subject to its order. But has this court by law the authority or the power to sequestrate property in cases where neither the right of property nor of possession is *en litige?* I think not, I know of no such vested in this tribunal, nor have I been able to find a single case in which, when this authority has been disputed, such a power has been exercised either in the courts of law of Lower Canada, or in old France. I have not found any such decision emanating from the courts of France under the code. This would be perhaps conclusive against the pretensions of Plaintiffs. But there is more in this case. Can I supersede all the enactments of the legislature, organizing and incorporating the Grand Trunk Railway Company? Can I set aside or supersede the authority of the directors, and virtually annul the corporate capacity of the company, by naming a *séquestre* to take possession of and manage the road and property of the company, or a receiver to collect the tolls and pay over the revenues, and thereby controlling the action of the board of directors in the exercise of some of their most important and responsible functions? Whatever may be the powers of a court of Chancery in England, in Upper Canada, or elsewhere, I am satisfied that this court, simply as a question of authority, has no such power. But, even if I had the authority contended for by Plaintiff, did the law of sequestration, as it existed in old France, and as it now prevails in Lower Canada, apply to such a case as this? I think I may safely affirm that there is not to be found a recorded case in the books of arrêts of old or new France, where the property of any corporation has been sequestrated by judicial authority; neither the law before or under the code expressly gives such a power and I have been unable to find an instance where any court has assumed to exercise such a right. Now without some principle of law plainly justifying such a course or some reported case similar or analogous to the one now under consideration and which might serve as a precedent for my guidance I do not feel that with the limited equity powers of this court, I would be justified in initiating such a jurisprudence. But, assuming that I had the authority contended for by Plaintiff, and that our law of sequestration was applicable to the case before me,

how could this court apply that law to a railroad more than 1100 miles in extent, running through five or six different jurisdictions, where the authority and the judgments of this court have no effect and are not recognized? I think a great and insuperable practical difficulty arises here. It is clear that I cannot sequestrate the whole road and property of the company. I think it is equally certain that I could not sequestrate the road and the property appertaining thereto in part. Both practically and legally such a proceeding as the last is out of the question. The *séquestre* I should name would take possession of and manage the part of the road and property within the jurisdiction of this court. The extent of that jurisdiction for purely judicial purposes, is, as I understand it, within the District of Montreal, while the remaining portions, the two ends, would be left to be managed by the Directors. Thus would be created a divided authority between the officer of the court, and the legally constituted corporate authorities of the company. Such a pretension requires only to be stated to carry with it its own refutation. As regards a Receiver, there is no such officer or administrator, that I am aware of, known to our law. Under no circumstances do I believe such an officer could be appointed by this court; but, even if so, in this case, the same difficulties of a pratical nature would attend his operations. He could only collect the tolls on one part of the road, could receive only a portion of the revenues and the truth is he would be pratically powerless. But supposing all these legal and practical difficulties to be overcome, has there been any case of necessity made out for the nomination of such an officer, as the one asked for in this case. It has not been conclusively proved by the evidence of record, that the company is insolvent, though certainly the testimony produced of its great embarrassment is quite conclusive. I do not think either that there is any conclusive evidence of a misapplication of the revenues of the company, or their appropriation to the payment of debts, not expressly stated by the law, to be among the first charges upon the road. "All the expenses of managing, working, and main-"taining the works and plant of the company," shall be a first charge by the Act of 1857. The Act of 1861 goes still further, and by the 8th sect. provides: "The interest of the "purchase money or rent of any real property acquired or "leased by any railway company, and necessary to the effi-"cient working of such railway, and the price or purchase "money of any real property or thing without which the "railway could not be efficiently worked, shall be considered "to be part of the expenses of working such railway, and "shall be paid as such out of the earnings of the railway." I

find nothing in the evidence adduced to show that the directors of the company have violated these acts. I have no right to assume that they will do so. No doubt the position of all the creditors of this great company is a most exceptional one and the remedies they must have recourse to in enforcing their rights, it is not my business to point out; the one asked for in this case is, in my opinion, inapplicable. Considering the case still further, it has not been shewn that the nomination of a *séquestre* or a Receiver would improve the management of the road, or ameliorate the condition, or promote the interest of the creditors; on the contrary, as well observed by one of the learned Counsels for Defendants, it would be perhaps easy to demonstrate, that the nomination of such an officer asked for by Plaintiff would, in all probability, prove most disastrous to the interest of all classes of creditors and lead in a short time to the stoppage of the road. Upon all these grounds, the court must refuse the prayer of Plaintiff's petition. Judgment will be entered up for the amount of the coupons fyled £312.

"The court considering that Plaintiff has established, by legal and sufficient evidence, that he is the holder of certain *coupons*, for interest on Preferential Bonds, and considering that, by law, Plaintiff is entitled to have and obtain from Defendants the several sums of money mentioned and specified in the *coupons*, amounting together to the sum of three hundred and twelve pounds, sterling money of Great Britain, equal to the sum of three hundred and seventy-nine pounds, twelve shillings, current money of this Province, doth condemn Defendants to pay and satisfy to Plaintiff the said sum of three hundred and seventy-nine pounds, twelve shillings, current money aforesaid, with interest thereon, from this date until paid. And the court proceeding to declare and adjudge upon the other conclusions of Plaintiff's petition by him therein taken, considering that Plaintiff has not established, by legal and sufficient evidence, that he was, at the time of the institution of the present action, the owner and holder of any of the Preferential Bonds mentioned and referred to in Plaintiff's petition, and under and in virtue of which he claims to have a first hypothec, mortgage, privilege and lien upon the railway and property of Defendants; seeing that Plaintiff hath not produced and fyled in the cause any of the bonds under and by virtue of which he claims to have a first hypothec, mortgage, privilege and lien upon the railway and property of Defendants; considering, therefore that, by law, this court cannot adjudge and delare that Plaintiff has, under and in virtue of the alleged Preferential Bonds, a first or any other hypothec, mortgage, privilege or lien upon the

railway and property of Defendants; considering, moreover, that, under the issue joined, it is not competent in law for this court to adjudge and declare that the whole or any part or portion of the railway and property of Defendants cannot legally be sold at sheriff's sale; considering that, by law and the constitution of this court, this tribunal has no power or authority to name and appoint a *séquestre* to take possession of and manage said railway and property; seeing that the office of receiver, such as mentioned and applied for in and by Plaintiff's petition, is unknown to our law, and cannot be named and appointed by the authority of this court; considering, moreover, that the law respecting *séquestration* of property in Lower Canada has no application, and cannot be legally applied to the judicial sequestration of the property of bodies politic and corporate, incorporated by Act of Parliament, unless by and with the consent of such bodies politic and corporate; considering, therefore, that this court has not the power or authority to sequestrate the railway and property of Defendants, nor any part thereof; seeing that Plaintiff hath not shewn, by legal and sufficient evidence, that there exists or existed, at the time of the institution of this action, any necessity for the nomination and appointment of a *séquestre* or receiver, as prayed for in his petition; considering, besides, that it is not established in evidence that any advantage would result to Plaintiff or to any parties interested in the affairs and property of Defendants from the nomination and appointment of such *séquestre* or receiver, doth overrule, reject and dismiss the last mentioned conclusions of Plaintiff. (5 *J.*, p. 313.)

ANDREW ROBERTSON, Hon. LEWIS T. DRUMMOND, Q. C., Hon. A. A. DORION, Q. C., counsel for Plaintiff.

F. P. POMINVILLE, T. W. RITCHIE, for Defendants.

SAISIE-ARRET AFTER JUDGMENT.

SUPERIOR COURT, Montreal, 30th September, 1861.

Coram SMITH, J.

JOHN G. MCKENZIE et al. *vs.* W. DOUGLASS, *and* R. R. BOWN et al., T. S.

Held: That a writ of saisie-arrêt after judgment cannot be issued against a tiers-saisi living in Upper Canada.

In this cause, a saisie-arrêt after judgment was issued and served upon the tiers-saisi in Upper Canada. Defendant fyled an *exception à la forme*, praying for the quashing of the writ, on the ground that such a writ could not be issued to attach

in Upper Canada. The clauses of the statutes, on which the issuing of the writ was sought to be justified are 22 Vic., c. 5, § 58, 23 Vic., ch. 23, ch. 57, § 36. The court held that these clauses did not confer authority to issue a proceeding, in the nature of an execution such as a *saisie-arrêt* in fact was, and direct it into another jurisdiction. The exception was therefore maintained, and the saisie-arrêt, in so far as it related to Robert R. Bown set aside. (5 *J.*, p. 329.)

ROSE and RITCHIE, for Plaintiff.

LAFLAMME, LAFLAMME and DALY, for Defendant.

PEREMPTION.

SUPERIOR COURT, Montreal, 31st May, 1861.

Coram MONK, A. J.

MACKAY *et al. vs.* GERRARD *et al.*

Held: That when one of the Defendants dies during the pendency of a suit, the time for peremption does not run during the 3 months and forty days allowed the heirs to deliberate.

Held also that on the death of one of several Defendants, the mandat of his attorney ad litem ceased. (1)

Defendants appeared by one attorney, F. Griffin, who, for them, obtained a rule: "That a judgment be rendered, declaring *péremption d'instance*, and dismissing this action with costs, no proceedings having been had therein during three years upwards now last past; with this rule they also fyled a certificate by the Prothonotary, of the last proceeding had in the case, viz.: a judgment of 17th May, 1858, ordering "all proceedings to be stayed until Plaintiffs shall have given security for costs." Plaintiffs, for cause against the rule, said that Henry Gerrard, one of the Defendants, died on the 20th day of June, 1858, since the last proceeding had in this cause; that, by the death, the *mandat* of F. Griffin, Q. C., as attorney of Gerrard, ceased, and Griffin was therefore incompetent to move (as he seems to have done) for the rule for *péremption* to which these presents are answer; that Griffin knew of the death of Gerrard; that Gerrard died, leaving heirs living abroad out of Canada, and, a Will; that, by law, from and after the decease of Gerrard, his heirs had a *délai* to deliberate as to accepting or renouncing to his succession, said *délai* being at least 3 months for making inventory, and forty days afterwards for deliberating, and during these three months and forty days *péremption* was interrupted, and Plaintiffs

(1) V. art. 203 et 455 C. P. C.

could not oblige said heirs to *reprendre l'instance;* that these three months and forty days being deducted from the total time since the last proceeding, there does not remain the time necessary for *péremption*, but only two years, seven months, or there abouts; that independently of the aforesaid reasons, there is another one to be derived from Defendants' motion for security for costs, which is in time and manner so made that *péremption* cannot now be awarded to Defendants as asked by them, but, at most, Defendants could only have moved that, in default by Plaintiffs to give security for costs, in a time to be fixed by the court, then Plaintiffs' action should be dismissed. For all the aforesaid reasons, the rule for *péremption* ought to be discharged." R. MACKAY shewing cause, cited the following authorities: Pothier, *Proc. Civ.*, part 1, chap. 4, pages 186 and 200; 1 Pigeau, *Proc. Civ.*, p. 356 of Edn of 1779. Judgment discharging the rule without costs. (5 *J.*, p. 331.)

MACKAY and AUSTIN, for Plaintiffs.

F. GRIFFIN, Q. C., for Defendants.

EXECUTION.—PROCEDURE.

SUPERIOR COURT, Montreal, 28th February, 1861.

Coram BERTHELOT, J.

SCHOLEFIELD et al. *vs.* RODDEN et al.

Held: That a *saisie* which is suffered to remain unacted on for more than two months ceases to exist.

These were motions for *contrainte par corps*, the one against the guardian for failure to represent the effects seized, and the other against Defendants for *rébellion à justice*, they having refused to allow the sheriff to enter their premises to make sale of the effects seized. The seizure was effected several years previous to the date of the writ under which the sheriff was ordered to sell, and was suspended by order of Plaintiffs.

PER CURIAM: It is quite impossible to entertain the present applications. A *guardian* cannot be proceeded against, if Plaintiff suffers his *saisie* to remain dormant for more than two months, and for the same reason there can be no *rébellion à justice* on the part of Defendant in connexion with such a seizure. The seizure under such circumstances is dead. Motions rejected. (5 *J.*, p. 332.)

JOHN ROSE, Q. C., for Plaintiffs.

A. and W. ROBERTSON, for Guardian and Defendants.

CONTEMPT OF COURT.—WITNESS.

SUPERIOR COURT, Montreal, 21st February, 1861.

Coram BADGLEY, J.

SEXTON *vs.* BOSTON, *and* EGAN, Int'g Party.

Held : That a rule for contempt of court against a witness who has not answered a *subpœna ad testificandum* will not lie, unless proof be made by affidavit of personal service, tender of reasonable expenses and wilful disobedience. (1)

In this case, a rule had been taken by the Intervening Party against Plaintiff, to show cause why he should not be held in contempt of court for not obeying a *subpœna ad testificandum.*

The Bailiff's return of personal service was fyled, and entry of default appeared by Plumitiff. Morison for Plaintiff shewed cause : The Applicant for rule must show by affidavit personal service of *subpœna*, tender of reasonable expenses, and wilful disobedience. The issuing of a rule for contempt was a proceeding according to English practice, and proof must be made in same form.

BADGLEY, J. : Proof must be made by affidavit of facts necessary to obtain rule. It must be shown affirmatively to the court that every thing has been done which was necessary to secure attendance of witnesses. The Bailiff's return is not sufficient to prove service, and mere entry of default is not enough. Besides there is no proof that reasonable expenses had been offered to the witnesses. The rule must therefore be discharged. Rule discharged. (5 *J.*, p. 334.)

M. MORISON, for Plaintiff.

BARNARD, for Intervening Party.

HOUSE DRAINS.—CITY DRAIN.—FLOODING OF CELLAR.—LIABILITY OF CITY.

SUPERIOR COURT, Montreal, 31th March, 1860.

Coram SMITH, J.

WALSH *vs.* THE MAYOR, ALDERMEN *and* CITIZENS OF THE CITY OF MONTREAL.

Held : 1. That the Corporation of the City of Montreal is liable for damages caused to the occupant of a house within its limits by the flow of water back from a city drain into the cellar of the said house, through a drain connecting said cellar with said city drain, where such back-flow is caused by obstruction in the city drain.

2. That interest on the amount of the condemnation money will run from the date of the judgment.

(1) V. art. 249 C. P. C.

Plaintiff's demand was to recover £145 11 8, damages alleged to have been suffered by him, in merchandise by the flooding of his cellar, in the City of Montreal, by reason of water from the City drain, in a heavy fall of rain, flowing into his cellar through a drain which connected the City drain with the cellar of the said house. Defendants met the demand by denying their liability for such damages, alleging further that if Plaintiff had suffered damages, they arose because his drain and cellar were placed too low, being beneath the level of the street tunnel.

SMITH, J.: " The Court, considering that Plaintiff hath fully established the material allegations of his declaration, and that, by reason of the imperfect state of the City drain, and by the obstructions allowed to remain therein, the water from the public drain flowed back into the cellar of Plaintiff, and that, thereby, he suffered damage to the extent of £80 11 5 ; and, further, considering that Defendants have failed to shew any thing by reason of which Defendants should not be held liable, therefor ; The Court doth condemn Defendants to pay to Plaintiff the sum of £80 11 5 with interest thereon from this day until actual payment." (5 *J.*, p. 335.)

LEBLANC and CASSIDY, for Plaintiff.

PAPIN, for Defendant.

N. B.—*Vide* similar decision 6 *R. J. R. Q.*, p. 378, *Kingan et al.* vs. *The Mayor*, &c.

DISSOLUTION OF PARTNERSHIP.

SUPERIOR COURT, Montreal, 30th November, 1861.

Coram SMITH, J.

MURPHY *vs.* PAGE et al.

Held : That partners who have fyled a certificate of partnership continue liable after dissolution, if they have omitted to fyle under the Partnership Act a certificate of dissolution. (1)

This was an objection against Page and another, for goods sold. Defendants denied the existence of a partnership. It was proved, however, that the partnership between the parties had been enregistered under the Partnership Act. No certificate of a dissolution had been enregistered ; the partners continued liable until such certificate was filed. Judgment for Plaintiff. (5 *J.*, p. 335.)

R. ROY, for Plaintiff.

DAY and DAY, for Defendants.

(1) V. arts. 1835 et 1900 C. C.

EXPERTISE.—PROCEDURE.

COUR SUPÉRIEURE, Beauharnois, 19 octobre 1861.

Coram POLETTE, J.

LAMARCHE *vs.* JOHNSON, *and* JOHNSON, en garantie, *vs.* MASSON.

Jugé : Que les parties doivent être présentes ou dûment appelées, lors des procédés d'expertise, quand même l'ordre référant la cause à l'expertise n'aurait pas ordonné que les parties fussent appelées ; et que le rapport des experts, qui ne constate ni la présence ni l'assignation des parties, est nul. (1)

Des experts furent nommés avec les instructions suivantes : " Pour tels experts s'enquérir si l'immeuble ci-après décrit a produit des fruits et revenus depuis le 22 mars 1844, et, dans ce cas, estimer quels ont été tels fruits et revenus, et faire rapport sans délai." Cet ordre avait été donné du consentement des parties. Les experts procédèrent et firent rapport. Les Demandeurs ayant requis l'homologation de ce rapport, le Défendeur en garantie demanda le rejet du rapport " parce que " les experts ont opéré et fait un rapport sans avoir, au préa- " lable, notifié ou fait notifier les parties intéressées du jour et " de l'heure où ils devaient agir et en l'absence des dites " parties." BRANCHAUD, pour Masson, cita Vasserot, *Manuel des experts*, page 14, n° 36 ; Guyot, *verbo Expert*, page 223 ; Nouveau Denisart, *verbo Expert*, p. 324. DOUTRE, pour Demandeurs, dit que l'assignation des parties pour les appeler aux procédés des experts n'est nécessaire que dans le cas où l'ordre de référence ordonne aux experts d'appeler les parties. Ce qui justifie cette opinion c'est que l'ancienne coutume de Paris, art. 79, exigeait que les parties fussent appelées, et que cet article fût supprimé, lors de la réforme de la coutume et remplacé par l'article 184, qui n'exige rien de semblable (Voir Guyot, vo. *Expert.*) Si le Défendeur en garantie désirait être appelé à l'expertise, il devait manifester ce désir, lorsqu'il donnait son consentement à la formule de référence.

JUGEMENT : Considérant que le Défendeur en garantie n'a pas été notifié, soit par les Demandeurs, soit par les experts, des lieu, jour et heure, que ceux-ci procéderaient aux opérations exigées d'eux par le jugement interlocutoire qui les nomme, aux fins que le Défendeur en garantie pût faire les dires, réquisitions et observations qu'il aurait jugé convenables, et qu'ainsi l'opération des experts est illégale et nulle, casse et rejette le rapport d'experts. (5 *J.*, p. 336.)

DOUTRE et DAOUST, pour Demandeurs.

ROSE et BRANCHAUD, pour Défendeur en garantie.

(1) V. art. 333 C. P. C.

LEASES.—MUNICIPAL TAXES.

SUPERIOR COURT, Montreal, 30th November, 1861.

Coram SMITH, J.

PINSONNEAULT *vs.* HENDERSON.

Held: That the rate levied upon all the assessable property in Montreal, under the provisions of the 3rd section of the Statute 22nd Vic., ch. 15, is recoverable by landlord from such of their tenants as by their leases have agreed to pay "the assessments of the said leased premises "during the said term."

This was an action by a landlord, to recover from his tenant the rate imposed by the Statute of 1859, and vulgarly denominated "The Special Tax"; the tenant having bound himself to pay the yearly assessments, in the form above stated. The Court gave judgment in favour of Plaintiff, as well in this case as in the several other cases below, and, in doing so, the Hon. Judge who pronounced the judgment remarked that there had been several objections made to the payment of this tax by the tenants, all of which might be reduced to three. First, that the assessment was made to pay a debt incurred for other than municipal purposes; 2nd, that the tax did not fall under the word assessments; 3rd, that it was not imposed by the Corporation, but by law. As to the first, he held that the money, the interest on which the special tax was intended to repay, was clearly obtained for the ordinary municipal purposes of improving and beautifying the city, and it was so little distinct from any other monies coming into the city Treasury that if the interest due to the Municipal Loan Fund were paid from other sources, or, if the amount of the tax exceeded the amount required, the balance went into the ordinary funds of the city. On the second head, he held that the term assessment had the same meaning as the word tax, except that it carried with it, besides, the idea of partition on some scale of the amount to be contributed among all the contributors. The third objection between a tax levied by the Corporation and by Parliament he thought in this case set up a distinction, without a difference. It was the Corporation which had borrowed the money, and the Corporation which had to pay it. All that the law did in this case which it did not do in all other was to say to the citizens if you do not voluntarily tax yourselves you will be forced to do it. The only other objection was that the special tax was not in contemplation of the parties when they made the lease; but, if there were anything in this objection, it would amount to this that if the lease were for years, the assessment to be paid by the tenant could never be more than the assessment at the

time the lease was made, the assessment for the first year. This was too contradictory a proposition to be admitted. Some of the leases on which he had to adjudicate could present no possible difficulty, because they stated that every tax, whatever, on the property was to be paid by the tenant. He cited some English authorities, as one at p. 243 of Woodfall, showing that such words would cover every kind of tax falling on the property, and, therefore, going much farther than his judgment. Judgment for Plaintiff. (5 *J.*, p. 338.)

A. H. LUNN, for Plaintiff.

BETHUNE & DUNKIN, Counsel.

F. G. JOHNSON, Q. C., for Defendant.

ACTION FOR MALICIOUS ARREST.

SUPERIOR COURT, Montreal, 30th November, 1861.

Coram MONK, J.

TUFT *vs.* IRWIN.

Held: That, in an action for malicious arrest in a criminal prosecution, the absence of any allegation that the arrest was made without probable cause is a fatal defect in the declaration.

This was an action for malicious arrest in a criminal prosecution; Defendant demurred to the action, on the ground that the declaration did not contain any allegation that the arrest was made without probable cause therefore. The demurrer came up for hearing with the inscription for hearing on the merits. The court was opinion that the objection taken by the demurrer was a sound one, and that the absence of the allegation in question was a fatal defect. The court, moreover, was against Plaintiff on the merits. The action was, therefore, dismissed. (5 *J.*, p. 340.)

M. DOHERTY, for Plaintiff.

MACKAY and AUSTIN, for Defendant.

BAIL.—TAXES MUNICIPALES.

CIRCUIT COURT, Montreal, 30 November, 1861.

Before SMITH, Justice.

BERTHELET *vs.* MUIR et al., MEYER *vs.* DAVIDSON, MEYER *vs.* DOUGALL, DUMAS *vs.* VIAU dit l'ESPÉRANCE, JUDAH *vs.* LAVOIE, BEAUDRY *vs.* ADAMS.

Jugé: Qu'un locataire, qui est tenu de payer "les cotisations," est tenu de fournir la taxe spéciale imposée sous la 22e Vict., ch. 15.

SMITH, Justice: In this case, Defendants were bound to pay: " the yearly assessments and water rates of said leased prem- " ises, and every other tax, charge and burden, which may be " imposed thereon by the corporation of Montreal during the " said term." In the case of Beaudry, the tenant was bound: " to pay the assessments to which the said leased premises " may be subject during the said term;" and in the case of Pinsonault: " to pay for the assessments of the said leased " premises during the said term." I am of opinion that the tenant, who is bound to pay " assessments," is bond for the special rate or tax imposed under the provisions of the 22 Vict., cap. 15. Judgment for Plaintiffs. (11 *D. T. B. C.*, p. 482 et 5 *J.*, p. 339 et 340).

BELLE, for Berthelet.

ABBOTT and DORMAN, for Muir et al.

EXECUTION DES MEUBLES.

SUPERIOR COURT, Québec, 5 octobre 1860.

Before STUART, Justice.

PAIGE *vs.* SAVARD.

Jugé: 1° Que la propriété immobilière d'un Défendeur peut être saisie en même temps que ses meubles, mais ses meubles doivent être vendus d'abord.

2° Que, lorsque le retour de l'huissier énonce que le Défendeur n'a pas de meubles, une procédure pour faire mettre de côté ce retour doit être adoptée avant qu'une opposition ne soit enfilée à la saisie de ses propriétés immobilières, fondée sur ce que ses meubles eussent dû être saisis et vendus d'abord. (1)

Execution having been sued out against the goods and chattels of Defendant, the bailiff made a return of *nulla bona.* A writ then issued in virtue of which his immoveables were seized. The Defendant filed an opposition *à fin d'annuler* to the seizure of his immoveables, alleging that, prior to the issuing of the writ under which his immoveables were taken in execution, he was in possession of moveable property which he specified in his opposition, and concluded that the seizure of his immoveables be set aside, his moveables not having been first seized and sold. The Plaintiff demurred to the opposition on the ground that it ought to have set forth the value of the moveable effects alleged as being in the possession of Defendant; and that, previously to filing the opposition, Defendant should have inscribed *en faux* against the return of the bailiff shewing that he, Defendant, had no moveables effects.

(1) V. art. 554 C. P. C.

DUVAL, for Plaintiff: The return of the bailiff setting forth that Defendant has no moveables is conclusive, so long as Defendant does not inscribe *en faux* against it; and Defendant should have stated the value of the articles specified in the opposition which he pretends he had in his possession at the time of the issuing of the execution against his moveables, because, if they are of little value, Plaintiff is not bound to discuss them previously to selling his immoveable property. (1)

PARKIN, for Defendant; The moveables must be discussed before Plaintiff can proceed to the sale of the immoveables. It is not necessary to inscribe *en faux* against the return of the bailiff; the affidavit of the party attached to his *opposition à fin d'annuler* alleging all the facts therein contained to be true and well founded in fact and in law, is a sufficient contradiction to the return of the bailiff.

STUART, Justice: All the property of a Defendant, the immoveable as well as the moveable, may be seized at the same time, but the moveable property must be first sold. The opposition here seeks to set aside the seizure of the immoveable property, because the personal property has not been sold. Now the return of the bailiff shews that there is no personal property, and, so long as no steps are taken to set aside this return, no ground of objection can be made to the seizure and sale of the immoveables. The opposition is therefore dismissed. (11 *D. T. B. C.*, p. 3.)

DUVAL and TASCHEREAU, for Plaintiff.

ANDERSON and PARKIN, for Defendant.

CAPIAS.

SUPERIOR COURT, Quebec, 12th November, 1860.

Before STUART, Justice.

TALBOT *vs.* DONNELLY.

Jugé: Qu'un affidavit pour *capias*, qui contient les allégations essentielles, requises par la 12me Vic., ch. 42, dans le disjonctif, au lieu d'être alléguées dans la forme conjonctive, ne peut valoir, et le *capias* doit être annulé. (2)

The affidavit upon which the writ of *capias* issued, alleged that the Defendant "est sur le point de laisser immédiatement "la province, avec l'intention de frauder ses créanciers en "général *ou* le déposant en particulier, et que le Défendeur a "caché, *ou* est sur le point de cacher ses biens, &c.; et que,

(1) 7 R. J. R. Q., p. 86.

(2) V. art. 798 C. P. C.

" sans le bénéfice d'un *capias ad respondendum* contre le corps " du Défendeur, le déposant perdra sa créance, *ou* souffrira du " dommage."

VANNOVOUS, for Defendant, moved to quash the *capias* on the ground that the affidavit was vague and uncertain, inasmuch as it did not state positively whom Defendant intended to defraud, whether his creditors generally or Plaintiff in particular; nor whether Defendant had secreted or was about to secrete his property, that it merely set forth that he had done so, or was about to do it, but this was not an allegation asserting the one fact or the other, it amounted to no allegation at all.

STUART, Justice: All the allegations required by the 12th Vic., cap. 42, in an affidavit to arrest the body of a Defendant, are stated in the affidavit here, in the negative form; it merely says that Defendant intends doing so and so, or something else; that without the benefit of a writ of *capias* Plaintiff will lose his debt, or something else. Now, all these essential allegations must be in the conjunctive and not in the disjunctive form; in a case where the liberty of the subject is concerned, the language must be clear and positive, and not merely in the negative as it is here. *Capias* quashed. (11 *D. T. B. C.* p. 5)

TALBOT, for Plaintiff.

VANNOVOUS, for Defendant.

CONTRAINTE PAR CORPS.—PROCEDURE.

SUPERIOR COURT, Quebec.

Before TASCHEREAU, Asst.-Judge.

McDONALD, Plaintiff, *vs.* McLEAN, Defendant, *and* WILSON, Opposant, *and* DOYLE, Adjudicataire.

Jugé: Qu'une règle pour contrainte par corps contre une femme sous puissance de mari, quoique séparée de biens, sera rejetée, à moins que signification de la règle ne soit faite au mari. (1)

The Opposant obtained a rule for a *contrainte par corps* against the *adjudicataire*, Elizabeth Doyle, wife of Edward T. Charlton, and separated from her husband as to property, for non payment of the difference of the purchase money of the property sold at her *folle enchère*.

PARKIN, for *adjudicataire*, contended that no attachment or *contrainte par corps* could issue against the body of a woman.

(1) V. art. 781 C. P. C.

TASCHEREAU, Juge: J'ai déjà maintenu qu'une motion ou règle pour *contrainte par corps* contre la personne d'une femme sous puissance de mari, quoique séparée de biens, ne pouvait être accordée sans avis au mari (1); et considérant que le mari de l'adjudicataire dans la présente cause n'a pas été notifié de l'application pour la *contrainte par corps*, la règle est renvoyée. (11 *D. T. B. C.*, p. 6.)

STUART and MURPHY, for Opposant.

ANDERSON and PARKIN, for *adjudicataire*.

COMMUNAUTE DE BIENS.—AMEUBLISSEMENT.

BANC DE LA REINE, EN APPEL, Montréal, 1 décembre 1860.

Présents: Sir L. H. LAFONTAINE, Bart., J.-en-C., AYLWIN, DUVAL, MEREDITH, MONDELET, Juges.

JARRY, Appelante, *et* THE TRUST AND LOAN COMPANY, Intimés.

Jugé: 1° Que dans le cas d'un contrat de mariage avec stipulation d'ameublissement, et cependant clause de réalisation, au cas de renonciation par la femme à la communauté, la femme séparée de biens ne peut réclamer comme reprise la jouissance du prix l'aliénation d'un immeuble donné pendant la communauté par la mère adoptive, à elle, sa fille adoptée et à son époux, avec condition d'insaisissabilité et pour servir d'aliments.

2° Que telle donation ne forme pas un propre à la femme.

3° Que le rapport du praticien qui en a accordé la reprise à la femme et le jugement homologuant ce rapport ne lient aucunement les tiers qui peuvent contester la réclamation de la femme.

4° Que, dans l'espèce, les Intimés avaient droit d'être colloqués préférablement à l'Appelante. (2)

L'Appelante ayant obtenu jugement en séparation de biens contre Simon Lacombe, son mari, fit saisir les immeubles de ce dernier, et nommément un terrain situé sur la rue Ste. Catherine, en la cité de Montréal. La vente de ce lot réalisa la somme de £525 4 7, que l'Appelante, comme adjudicataire, retint entre ses mains, et que le protonotaire fut appelé à distribuer suivant les créances apparentes au dossier. Au nombre des réclamations était celle de l'Appelante pour ses reprises matrimoniales; celle de Maxime Lacombe, tuteur élu à certaine substitution créée en faveur des enfants de l'Appelante avec son mari; Joseph Lemai dit Delorme, qui avait une hypothèque de garantie sur l'immeuble vendu; et les Intimés, pour prêt d'argent fait au Défendeur pour rebâtir les édifices qui avaient existé sur ce terrain et avaient été détruits par

(1) 8 R. J. R. Q., p. 463, *Cloutier* vs. *Cloutier*.

(2) V. art. 1272, 1273, 1275, 1276, 1393 et 1400 C. C.

l'incendie de juillet 1854, réclamant une préférence sur toutes autres hypothèques. Par son contrat de mariage reçu devant notaires, le 15 janvier, 1828, et enregistré le 11 juillet, 1844, il fut stipulé qu'il y aurait communauté de biens entre elle et Lacombe, ameublissement de tous les biens à eux appartenant, et qui pourraient leur écheoir à l'avenir; et, droit de reprendre par l'Appelante, lors de la dissolution de la communauté et en cas de renonciation à icelle, tout ce qu'elle y aurait apporté ou lui serait avenu, pendant icelle, tant par succession, *donations* legs *qu'autrement*, et ce franchement et quittement. Par acte du 14 mai, 1829, Barron, notaire, Marie Louise David, veuve de Frs Bleignier dit Jarry, fit donation entre vifs à Simon Lacombe et Rosalie Jarry, (l'Appelante), fille adoptive de la donatrice, Lacombe acceptant, tant pour sa femme alors mineure que pour les enfants qui pourraient naître de leur mariage, c'est à savoir, à Simon Lacombe et à Rosalie Jarry, de la jouissance et usufruit, et à leurs enfants, de la pleine propriété d'une terre décrite dans cet acte, " pour de la dite terre et autres objets y " mentionnés en jouir, par Simon Lacombe et Rosalie Jarry, à " titre de constitut et précaire, leur vie durant et du survivant " d'eux, sans que la jouissance et usufruit puisse être arrêtée et " saisie pour aucunes dettes des dits Simon Lacombe et son " épouse, voulant et entendant la donatrice pourvoir à leur loge- " ment, nourriture et entretien, leur vie durant et du survivant " d'eux, et les mettre en état d'élever, nourrir et entretenir les " enfants qui pourraient naître de leur mariage, et, après le " décès du survivant des dits Lacombe et son épouse, les dites " terres et dépendances, le tout retournera et appartiendra " aux enfants nés et à naître du dit mariage, pour en disposer " par eux en pleine propriété, et, à défaut d'enfants, à ceux " qui se trouveront alors être les plus proches parents de la " donatrice." Par un autre acte du 21 octobre 1842, la dite David donna à Lacombe et à Rosalie Jarry, *ses gendre et fille*, certains effets et deniers y mentionnés, moyennant une rente viagère. Le huit mai 1846, sur requête présentée par Pierre Lacombe, tuteur à la substitution contenue en la donation du 14 mai 1829, et de Lacombe et sa femme, ils furent autorisés en justice à vendre la terre mentionnée et décrite en cette donation, pour une somme pas moindre que 9000 livres ancien cours, dont les deniers seraient " employés en achat d'héritages " situés en la cité de Montréal, au profit des enfants des dits " Simon Lacombe et Rosalie Bleignier dite Jarry, son épouse, " étant bien entendu que les deniers ne sortiront des mains de " l'acquéreur de la terre que pour entrer en celles du vendeur " ou des vendeurs des héritages qui doivent être acquis par " Simon Lacombe et sa femme, conjointement avec le tuteur à " la substitution, et que, dans le contrat de cette acquisition, il

" sera fait déclaration de l'origine des deniers, afin que les " héritages ainsi acquis.... servent de remploi et tiennent " nature de propre, par subrogation, aux enfants du dit Simon " Lacombe et sa femme,.... et cette acquisition ne sera néan- " moins valable qu'après qu'elle aura été confirmée et ratifiée " en justice, par un avis de parents des enfants." Sur cette autorisation, la terre fut mise aux enchères et adjugée à James Buchanan, pour 9000 livres, et le contrat lui en fut passé devant Labadie, notaire, le 27 février 1847. Dans cet acte, néanmoins, on s'écarta des conditions fixées par la cour ; Lacombe et sa femme reçurent de l'acquéreur 5000 livres, et les 4000 livres restant étaient stipulées payables à époques fixes, à Simon Lacombe et sa femme, qui, *pour assurer la garantie de la vente,* hypothéquèrent spécialement, jusqu'à concurrence de 9000 livres, plusieurs terrains, et entre autres celui vendu en cette cause, au moyen de laquelle hypothèque Buchanan dispensa Lacombe et sa femme de l'emploi des deniers ordonné par le juge. Le praticien nommé pour constater les reprises matrimoniales de l'appelante, sur sa renonciation à la communauté, lui attribua : 1° La somme de 9000 livres, prix de la vente à Buchanan, dont l'appelante ne devait cependant avoir que la jouissance ; 2° tous les effets en nature donnés par l'acte de donation du 21 octobre 1842 ; 3° une somme de 5500 livres, montant des deniers donnés à l'appelante par la dite David, et que Simon Lacombe avait employés à payer un immeuble qu'il avait acheté de François Lebœuf dit Laflamme ; 4° 860 livres pour le quart des arrérages de la rente payable à la dite David par Antoine Voyer, et transporté à l'appelante par l'acte du 21 octobre 1842 ; 5° Enfin la somme de 300 livres, par une jument donnée par la dite David pour l'appelante, en paiement d'un lopin de terre acheté par Simon Lacombe de Pierre Lapointe ; formant un total de 15660 livres. Ce rapport du praticien fut homologué par la cour, et l'Appelante en réclamait le paiment en faisant remonter son hypothèque à la date du contrat de mariage. De son côté, l'intervenant, Maxime Lacombe, le présent tuteur à la substitution créée par la donation du 14 mai 1829, réclamait au nom de la substitution en vertu de l'hypothèque sur le lot de terre vendu en cette cause, contenu en l'acte du 27 février 1847, le montant des 9000 livres prix stipulé en ce dernier acte. L'Opposant Joseph Lemai dit Delorme, successeur de James Buchanan, dans la possession de l'immeuble vendu par l'acte du 27 février 1847, réclamait, pour sûreté du trouble auquel il était exposé de la part des substitués, le montant des 9000 livres, ou cautions suffisantes contre ce trouble. L'opposition des Intimés était fondée sur deux obligations que leur avait consenties Simon Lacombe, avec la corporation de Montréal, en date du

13 avril 1853, devant Doucet, notaire, et enregistrées le même jour; et les conclusions demandaient la collocation *par privilège et suivant la date des dites obligations.* Le rapport de distribution préparé par le protonotaire colloqua l'Appelante comme suit: " 5° Vu l'opposition faite par la Demanderesse se fondant sur le jugement rendu en cette cause, le 28 mai 1859, homologuant le rapport du praticien pour constater les reprises matrimoniales de la Demanderesse, et nommément cette partie qui a rapport à une somme de 9000 livres ancien cours, prix d'un immeuble vendu par Pierre Lacombe, ès-qualité, avec le Défendeur et la Demanderesse, à James Buchanan par acte devant Labadie et confrère, notaires, en date du 27 février 1847, et dont le Défendeur a reçu le montant, duquel immeuble la Demanderesse et le Défendeur n'avaient que la jouissance, à charge de substitution en faveur de leurs enfants, ou autres personnes y indiquées, à défaut d'enfants, et pour sûreté de laquelle somme le Défendeur et la Demanderesse hypothéquèrent divers immeubles, parmi lesquels se trouvent celui dont les deniers sont distribués par les présentes; vu aussi l'opposition faite par Joseph Lemai dit Delorme, comme étant au droit de Buchanan, et ayant acquis de lui le susdit immeuble, réclamant une sûreté contre tout trouble auquel il pourrait être exposé à raison de la substitution ci-dessus mentionnée et du paiement qu'en a reçu le Défendeur: Sur les deniers restés entre les mains de la Demanderesse comme adjudicataire de l'immeuble à elle adjugé en cette cause, elle gardera entre ses mains, comme partie du prix, la somme de 9000 livres égale à £375 0, dont elle aura la jouissance sa vie durante, pour ensuite appartenir aux enfants issus de son mariage avec le Défendeur, ou autres personnes qui pourront y avoir droit en vertu de la donation consentie par Marie-Louise David, veuve de feu Frs. Bleignier dit Jarry au Défendeur, acceptant tant pour lui que pour la Demanderesse, le dit acte reçu le 14 mai 1829, devant Thos. Barron et son confrère, notaires, £375 0 0; 6° La Demanderesse Opposante gardera de plus sur son prix d'adjudication, en extinction de ses autres reprises matrimoniales portées au jugement du 28 mai 1859, et se montant à la somme de £277 10, £94 18 5½; 7° Il sera payé à Bondy et Fauteux, avocats de la Demanderesse, et Demandeurs par distraction de frais, sur les jugements obtenus en cette cause par la Demanderesse contre le Défendeur £27 2 5½; Plus, frais d'opposition de la Demanderesse, £3 11 8, au protonotaire £0 11 8; 8° A l'Opposant Joseph Lemai dit Delorme, ses frais d'opposition à L. Bélanger £3 11 8; au protonotaire, £0 11 8. Les Intimés contestèrent les collocations 5e, 6e et 7e, alléguant que l'Appelante n'avait droit à aucune des reprises ci-dessus mentionnées à raison de l'ameublissement porté dans

son contrat de mariage, et que le rapport du praticien, ainsi que l'homologation d'icelui, ne devaient avoir aucun effet ; ils niaient de plus l'existence des reprises, et alléguaient qu'en vertu de l'acte de la 16e Vic., ch. 25, ils avaient un privilége sur tous autres créanciers par le recouvrement des deniers par eux avancés au Défendeur Simon Lacombe, et qui avaient servi à construire les bâtisses qui sont érigées sur le terrain vendu. Leurs conclusions tendaient à faire déclarer que l'Appelante n'avait aucun droit d'hypothèque sur le terrain vendu ; qu'elle n'avait même aucun droit de reprise tel que porté au dit rapport de praticien ; et, partant, qu'il fût déclaré que la compagnie de dépôt et de prêt du Haut Canada, avait et a droit d'être, comme créancier privilégié et hypothécaire, colloquée et payée, par préférence et à l'exclusion de l'Appelante ; et, conséquemment, qu'il fût ordonné que le rapport de distribution sera modifié et changé en conséquence. Cette contestation ne fut signifiée qu'à l'Appelante, qui seule fut appelée à y répondre et seule lia contestation avec les Intimés, Maxime Lacombe, le tuteur à la substitution, ainsi que Lemai dit Delorme, n'y ayant été aucunement parties. Le 29 février, 1860, la Cour Supérieure rendit le jugement qui suit : THE COURT, Considering that Rosalie Jarry has no mortgage, right or claim, in and upon said real estate, or the proceeds thereof, for the sums of money allowed to her in and by the fifth and sixth items of collocation, nor for the costs allowed in the seventh item of collocation either for herself or her said attorneys, *par distraction de dépens*, on said judgments : and considering that Opposants and Contestants, The Trust and Loan Company of Upper Canada, have a right to be collocated in the distribution upon the proceeds of said real estate, doth maintain the contestation and doth order and adjudge that the draft of distribution be corrected and amended by striking out the fifth, sixth and seventh items of collocation so made in favor of Rosalie Jarry, and Bondy and Fauteux, her attorneys for distraction &c." L'Appelante s'est pourvue en appel et a obtenu un jugement de confirmation dont le motivé porte qu'il n'y a pas d'erreur dans le jugement dont est appel. Le tuteur à la substitution n'était pas partie à l'appel non plus que l'acquéreur de la propriété substituée. (1) (11 *D. T. B. C.*, p. 7.)

BONDY et FAUTEUX pour l'Appelante.

JUDAH H., pour l'Intimée.

(1) Par l'acte 16 Vic., ch. 77, Les Intimés avaient un privilège spécial sur les *bâtisses* construites avec les deniers qu'ils prêtaient aux incendiés de 1852 à Montréal.

FOLLE ENCHERE.—MARRIED WOMEN.—SUMMONS.

COURT OF QUEEN'S BENCH, Montreal, 1st September, 1862.

Coram Sir L. H. LAFONTAINE, C.-J., Bart., AYLWIN, J., DUVAL J., MEREDITH J., C. MONDELET, A. J.

DAME ROSALIE JARRY *et vir*, (Adjudicataire in the court below,) Appellants, and THE TRUST AND LOAN COMPANY OF UPPER CANADA, (Opposant in the court below,) Respondent.

Held: That, where a rule for *folle enchère* obtained against a married woman has not been served upon the husband of the woman, all the proceedings on the application for *folle enchère* will be set aside as null and void, inasmuch as the married woman, notwithstanding her being separated as to property, has not ceased to be *sous puissance de mari.*

On the 21st November, 1859, Appellant, Rosalie Jarry, became *adjudicataire* of a property sold by the sheriff of the district of Montreal, in execution of the judgment of separation as to property obtained by Appellant Jarry against her husband Simon Lacombe. The bid of Appellant Jarry was received by the sheriff, and she became *adjudicataire* by virtue of a special power of attorney from her husband of which an authentic acte was attached to the return of the writ of execution. The Appellant Jarry, who had retained in her hands the price of her adjudication by giving security, not having deposited this price after the judgment of distribution which gave the amount to other creditors, the Respondent, who was one of these creditors, made in the court below a motion and obtained a rule *nisi*, in order to the re-sale of the land in question *à la folle enchère* of the *adjudicataire.* This motion and rule were served only upon Appelant and her husband received no notice whatever. The Appellant alone appeared at the return of the rule, and the following judgment (28th February, 1862, BADGLEY, J.) was rendered: "The court doth declare the said rule absolute, inasmuch as it appears, by the answer or declaration in writing of the sheriff of this district to the motion of Opposant, the Trust and Loan Company, requiring him to shew cause why he, the sheriff, had not paid to Opposant the different sums of money awarded to Opposant, in and by the judgment of distribution duly homologated according to law, and afterwards delivered to the sheriff according to the course and practice of this court, that Rosalie Jarry, the Plaintiff and adjudicataire of the immoveable property hereinafter mentioned and described, has neglected and refused to pay to the sheriff the amount of her purchase money still due, to wit, the sum of £525 4 7, of lot number one described in the schedule filed by the sheriff annexed to his return to the writ of

execution : Doth order that a writ of *venditioni exponas* do issue in due course of law, ordering the sheriff, after the usual advertisements and publications in that behalf, to proceed to the sale *de novo* of the lot of land purchased as aforesaid by Rosalie Jarry, at the *folle enchère* costs and charges of Rosalie Jarry." The judgment of the court below was reversed in appeal, and the judgment in appeal was recorded as follows ; La cour, 1° considérant que la demande ou règle pour folle enchère, obtenue contre l'Appelante, n'a pas été signifiée au mari de l'Appelante, et que, par conséquent, toute la procédure sur la demande pour folle enchère est entachée de nullité, et que l'Appelante est bien fondée, en répondant à la règle, à invoquer cette nullité, puisqu'elle n'a pas cessé, nonobstant sa séparation de biens, d'être sous sa puissance de mari, et qu'il s'agit, en cette instance, d'adjudication d'immeubles ; 2° considérant que, dans le jugement de la cour de première instance, qui ordonne qu'il émane un bref de *venditioni exponas*, à l'effet de faire procéder *de novo* à la vente du terrain en question, à la folle enchère, de Rosalie Jarry, il y a mal jugé, duquel jugement le présent appel a été interjeté ; infirme le jugement rendu le 28 février 1862, par la Cour Supérieure siégeant à Montréal, avec dépens, sur le présent appel contre l'Intimée ; et cette cour, procédant à rendre le jugement que la Cour Supérieure aurait dû rendre, met au néant la demande, ou règle pour folle enchère, et toute la procédure, concernant icelle, comme étant entachées de nullité, et remet les parties dans le même état qu'elles étaient avant l'introduction de la demande ou règle, pour folle enchère. (8 *J.*, p. 29.)

BONDY et FAUTEUX, pour les Appelants.

H. JUDAH, pour l'Intimée.

Vide Cloutier vs. *Cloutier*, 8 *R. J. R. Q.*, p. 463, and *McDonald* vs. *McLean supra* p. 363, both decided by Taschereau, A. J., at Quebec.

LOUAGE DE MAISONS.

COUR DE CIRCUIT, Québec, 8 décembre 1860.

Présent : TASCHEREAU, Juge.

LAMBERT *vs.* LEFRANÇOIS.

Jugé : Qu'un bail peut être rescindé faute par le locateur d'avoir pourvu de lieux d'aisance la maison louée, quand par suite de cette absence, les prémisses sont devenues insalubres. (1)

Cette action fut portée en vertu de la 18e Victoria, ch. 108, sec. 3, sous-sec. 3. Le Demandeur, par sa déclaration, représen-

(1) V. art. 1612 C. C.

tait que la partie de maison qu'il occupait en qualité de locataire du Défendeur était devenue insalubre et inhabitable pour deux raisons, savoir : parce qu'un dalleau destiné à la décharge des eaux sales et passant près de la fenêtre de l'étage occupé par le Demandeur avait été converti en conduit ou vidange de matières fécales, et parce que le Défendeur, depuis le bail, avait laissé exposés et découverts d'anciens lieux d'aisance ci-devant à l'usage de la maison. Le Demandeur alléguait, de plus, que le Défendeur avait complètement omis et négligé de remplir les obligations qui, par la loi, incombaient aux locateurs, le tout malgré un protêt préalablement servi au Défendeur pour faire cesser cet état de choses. Et le Demandeur concluait à la rescision du bail avec dépens. Le Défendeur répondit à cette déclaration par une défense aux fond en fait, et une exception péremptoire en droit perpétuelle, basée sur ce que, dans le bail, le Demandeur s'était déclaré satisfait et content des prémisses pour les avoir occupées comme locataire antérieurement, et les occupait encore lors de la passation du bail, ajoutant que le dalleau dont se plaignait le Demandeur avait toujours été employé à l'usage auquel il était employé alors, et que ce n'était que tout récemment que le Demandeur avait songé à s'en plaindre.

JUGEMENT : " Vu le bail, la plaidoirie et la preuve faite ; considérant que la partie de maison louée par le Défendeur au Demandeur est très insalubre, et, par conséquent, inhabitable, et cela, par suite de ce que cette maison n'est pas pourvue, suivant la loi, de lieux d'aisance, et que les autres locataires de la maison sont forcés de se servir d'un dalleau communiquant du haut en bas de cette maison, et passant près des fenêtres des appartements occupés par le Demandeur, pour y jeter toutes sortes d'immondices, et surtout des matières fécales ; et considérant qu'une telle pratique est en violation directe des réglements de saine police, et qu'il est prouvé clairement que l'odeur insupportable qui existe dans la partie de cette maison occupée par le Demandeur provient de la présence de ce dalleau ; la cour déclare que le Demandeur a droit de se plaindre de cet état de choses, et est justifiable à demander la résiliation du bail ; et, en conséquence, déclare le bail rescindé à toutes fins que de droit. (11 *D. T. B. C.*, p. 16.)

CANNON et CASGRAIN, pour le Demandeur.

BELLEAU et JOLICŒUR, pour le Défendeur.

TESTAMENT.—LEGS.—ENFANTS.

COUR SUPÉRIEURE, Québec, 29 décembre 1860.

Présent TASCHEREAU, J. T., Juge S. C. S.

GLACKMEYER, Demandeur, *vs.* LE MAIRE, LES CONSEILLERS ET CITOYENS DE LA CITÉ DE QUÉBEC, Défendeurs, *et* LAGUEUX, Intervenante.

Jugé : 1° Que, dans l'espèce, les termes " enfants alors vivants " comprennent les petits enfants, descendant en ligne directe de la testatrice, et que par droit de représentation les dits petits enfants tiennent directement de leur bisaieule et non de leur mère, leur droit au legs de la propriété de l'immeuble par eux réclamé.

2° Que les lettres de ratification n'ont pour effet que de purger les hypothèques, sans aucunement fortifier le titre d'acquisition dont la ratification est demandée, lequel, nonobstant telle ratification, reste avec toutes ses défectuosités et tous ses vices.

TASCHEREAU, J. T., Juge : Par son testament du 26 janvier, 1816, devant Planté, notaire, Cécile Maranda, veuve de François Griault, donna et légua à Cécile Griault, sa fille, et à Etienne C. Lagueux, mari de cette dernière, l'usufruit et jouissance, leur vie durante, de l'emplacement réclamé par le Demandeur, et la propriété aux enfants de Cécile Griault et du dit Lagueux, pour être partagée également entre eux. Les usufruitiers prirent possession de leur legs, et en jouirent jusqu'à leur mort respective, la testatrice étant décédée le 14 juin, 1819. Du mariage des dits Lagueux et Cécile Griault sont nés trois enfants, Joseph Lagueux, Cécile Lagueux, épouse de feu Jean Olivier Brunet, et Henriette Lagueux, femme d'Edouard Glackmeyer. Etienne C. Lagueux meurt le 3 août, 1842, et sa femme, Cécile Griault, le 5 septembre, 1845. Henriette Lagueux meurt le 19 mai, 1833, laissant issus de son mariage, avec Glackmeyer, cinq enfants et, entr'autres, le Demandeur. Lors de la mort de Cécile Griault, tous ses enfants vivaient, à l'exception de madame Glackmeyer qui était décédée le 19 mai, 1833, et des cinq enfants du mariage de la dame Glackmeyer tous étaient vivants à sa mort, excepté Denis Marc Glackmeyer qui était mort avant sa mère. La déclaration du Demandeur, qui renferme une demande au pétitoire du tiers-indivis d'un immeuble y désigné, allègue que les quatre enfants survivants du mariage d'Edouard Glackmeyer, (petits enfants de Cécile Griault) sont compris dans le legs que leur bisaïeule, Cécile Maranda, a fait de cet immeuble à ses petits enfants : qu'à la mort de Cécile Griault, les enfants Glackmeyer étaient propriétaires pour un tiers dans cet emplacement, par indivis avec leur tante, madame Brunet, et leur oncle Jos. Lagueux. La déclaration allègue, de plus, que le Demandeur est cessionnaire des parts de ses trois frères dans le

dit emplacement, en vertu d'un acte de cession, en date du 8 septembre, 1857, exécuté devant Defoy, notaire, et conclut à ce que les Défendeurs soient tenus de lui livrer le tiers indivis du dit immeuble, avec £1000 de fruits et revenus, et conclut au partage par licitation. Les Défendeurs, après avoir comparu, ont fait défaut de plaider, mais leurs intérêts sont représentés par Cécile Adelaïde Lagueux, veuve Brunet, une des enfants de Cécile Griault, laquelle intervient dans l'action, et par son intervention allègue : 1° Que, lors du décès de sa mère, qui est aussi la grand'mère du Demandeur et de ses frères, deux de ses enfants seuls vivaient, savoir, elle, madame Brunet, et J. Lagueux et que madame Glackmeyer, mère du Demandeur, était morte avant sa mère, et que cette dernière (Madame Glackmeyer) n'avait acquis aucun droit dans l'immeuble, vu qu'elle était décédée avant l'ouverture du legs, et qu'en conséquence les enfants de la dite dame Glackmeyer n'avaient eu aucun droit au legs en question, et qu'elle, madame Brunet, et Joseph Lagueux y avaient eu seuls droit. 2° Que par la mort de Cécile Maranda, ses petits enfants, y inclus la mère du Demandeur, avaient été saisis de la propriété, et que le Demandeur et ses frères, à la mort de leur mère, comme ses héritiers, étaient devenus saisis de sa succession, dans laquelle était le tiers du dit immeuble, et que les dits enfants avaient cédé leur droit à la succession de leur mère et grand'mère maternelle, à Edouard Glackmeyer leur père, suivant acte devant Louis Prévost, notaire, le 12 février, 1851, et que, quant au Demandeur, cette cession avait eu lieu verbalement ou par acte non découvert. L'intervenante allègue que Ed. Glackmeyer et l'intervenante étant les propriétaires par indivis de cet immeuble, l'ont vendu aux Défendeurs, suivant acte de vente en date du 24 janvier, 1853, pardevant Defoy, notaire; que les Défendeurs ont demandé et obtenu des lettres de ratification de leurs titres d'acquisition du dit immeuble ; qu'elle, l'intervenante, a acquis la prescription de dix ans et de trente ans, et que le Demandeur en cette cause n'était qu'un prête-nom au profit de son père, Edouard Glackemeyer, et conclut au renvoi de l'action pour la moitié par elle vendue aux Défendeurs. L'autre vendeur, E. Glackmeyer, par une simple requête, a reconnu son obligation de garantir les défendeurs comme leur vendeur, et demande acte de ce qu'il se tient responsable envers les Défendeurs de toutes les conséquences qui peuvent résulter de l'action du Demandeur. Les parties ont fait une enquête et filé une admission de faits, à l'effet de constater : 1° que, le 24 janvier 1853, l'immeuble valait en totalité £1600 ; 2° que les revenus de l'immeuble, depuis le 5 septembre 1845, au 1er février 1853, ont été de £529 3 7, dont il doit être déduit pour réparations, assurances et cotisations, la somme de £150, dont moi-

tié contribuée par l'intervenante, laissant une balance nette de revenus de £379 3 4; 3° que, du 1er février 1853, les revenus de l'immeuble devront être calculés sur la valeur de l'immeuble, £1600, à 6 p. 100. Il s'élève en cette cause les questions suivantes: 1° Les enfants issus du mariage d'Ed. Glackmeyer avec Henriette Lagueux, peuvent-ils prendre, par représentation de leur mère, décédée, le legs fait par leur bisaïeule, Cécile Maranda, à ses petits enfants vivants à la mort du dernier de leur père et mère, Et. C. Lageux et Cécile Griault, étant prouvé que Henriette Lagueux est décédée avant l'ouverture du legs, et sont-ils compris dans ce legs? 2° Les enfants Glackmeyer, y compris le Demandeur, ont-ils cédé et transporté à leur père, Edouard Glackmeyer, leurs droits au legs? 3° La prescription invoquée par l'intervenante est-elle légalement prouvée? 4° quel effet a eu en faveur du titre des Défendeurs l'obtention des lettres de ratification qui peuvent lui avoir été accordées par cette cour? 5° Le Demandeur n'est-il qu'un prête-nom et comment ce fait résolu dans l'affirmative aurait-il affecté la présente action? 6° Si les questions ci-dessus sont résolues d'une manière favorable au Demandeur, quel jugement cette cour doit-elle prononcer? J'avoue que je n'en suis pas venu à la solution de la première question qui est la principale et la seule qui ait pu sérieusement m'occuper, sans quelque difficulté, et que cette difficulté ne s'est qu'accrue au contact des savantes opinions que j'ai trouvées dans la discussion d'une cause à peu près analogue à celle-ci, la cause de *Martin* et *Lee*. (5 *R. J. R. Q.*, p. 292.) Dans cette dernière cause, je trouve l'opinion d'un très savant jurisconsule qui, appelé comme juge à décider cette même question, l'a décidée avec pleine conviction dans un sens contraire à celui que ses confrères Juges l'ont fait en grande majorité. Le respect que j'entretiens pour les hautes connaissances de ce juge m'ont fait longtemps hésiter dans ma détermination finale. Cependant, après avoir consulté les nombreuses autorités qui traitent de cette question de représentation, j'en suis venu à la conclusion que les termes *enfants alors vivants*, comprenaient les petits enfants descendant en ligne directe alors vivants, qu'au moyen de la représentation les enfants Glackmeyer tiennent directement de leur bisaïeule, et non de leur mère, leur droit au legs de la propriété de l'immeuble en question, et que, si le demandeur, sous tous autres rapports, a prouvé sa cause, et que l'intervenante n'ait point porté atteinte à ses droits par son intervention et son exception péremptoire, le Demandeur devait avoir gain de cause. (1) S'il est vrai que, suivant les autorités

(1) *Cout. de Paris*, art. 319; 2 Furgole, (éd. 1777) pp. 342, 343, 344. Nos. 117 à 125; 4 *Grande Coutume de Paris*, p. 787, No. 1; LeBrun, *Successions*,

citées, les enfants Glackmeyer doivent être censés tenir leurs droits de leur bisaïeule, Cécile Maranda, et non de leur mère, Henriette Lagueux, la prétention de l'Intervenante, à l'effet de dire que les enfants Glackmeyer, comme héritiers de leur mère, ont cédé leurs droits dans la succession de cette dernière à leur père, Ed. Glackmeyer, doit s'écrouler comme manquant par sa base, puisqu'ils n'ont pu céder ce que leur mère n'avait jamais possédé, et ce qu'elle n'a eu que l'espoir de posséder. Maintenant, voyons si les actes de cession par les enfants Glackmeyer à leur père, comprennent transport des droits afférant aux enfants du chef de leur bisaïeule, Cécile Maranda : un de ces actes de cession en date du 12 février 1851, par Edouard Claude Glackmeyer et Henri Romuald Glackmeyer, passé par devant Mtre. Ls. Prévost, ne contient qu'un transport de leurs droits comme héritiers de leur grand-père, Etienne Claude Lagueux, et de leur grand-mère, Cécile Griault, mais il n'y est nullement question des droits leur venant de leur bisaïeule, Cécile Maranda. L'autre acte de cession qui est en date du 15 mai 1854, devant Ls. Prévost, est consenti par les quatre frères Glackmeyer, en faveur de leur père, de leurs droits dans la succession de leur mère. On voit qu'il n'y est pas question de leurs droits dans la succession de leur bisaïeule, qui par son testament leur a laissé un legs qui n'a pas passé entre les mains de leur mère, n'y a pas fait souche et qu'ils tiennent de leur bisaïeule seule. Le Demandeur et ses frères n'ont donc pas cédé à leur père les droits par eux réclamés ; il faut que leur père qui est un homme de loi, se soit trompé ou ait été mal avisé sur l'interprétation des droits qu'il dérivait de ces transports, puisqu'il s'est joint à l'Intervenante pour vendre ce que, l'un et l'autre, ils n'avaient pas le droit de vendre aux Défendeurs au détriment du Demandeur et de ses frères. 3°. La troisième question relative à la prescription ne souffre aucune difficulté. D'abord, il est constant que, si une prescription peut militer contre les enfants Glackmeyer ce ne peut être que depuis 1845, époque de l'ouverture de la propriété du legs par la mort de Cécile Griault, l'usufruitière, ce qui ne fait que treize ans à venir à l'institution de l'action ; or, l'Intervenante ne produit pas d'autre titre de propriété que celui qu'elle peut dériver de l'interprétation en sa faveur du fait qu'elle était seule vivante avec Joseph Lagueux, des petits enfants de Cécile Maranda, et comme la Cour a jugé et interprété la question de droit contre elle, il s'ensuit qu'elle n'a aucun titre pour appuyer sa prescription de treize ans, et encore cette troisième question doit-elle être résolue contrairement aux

p. 209, No. 17 ; 6 Pothier, *Successions*, pp. 40, 41, 42, 43 ; 2 *Dictionnaire de Droit*, vbo. *Représentation* ; 6 Merlin, *Rép.*, vbo. *Enfants*, pp. 4 et 5 ; Ricard, *Substitutions*, No. 587.

vues de l'Intervenante. 4° La quatrième question se résout par le seul exposé que les lettres de ratification n'ont pour effet que de purger les hypothèques sans aucunement fortifier le titre d'acquisition qui, nonobstant la ratification, reste avec toutes ses défectuosités et tous ses vices. 5° Rien dans cette cause ne prouve que le Demandeur ne soit qu'un prête-nom en faveur de son père, ce qui dispense la Cour de se prononcer sur l'effet qu'aurait produit dans la cause la preuve de ce fait. 6° Il ne reste plus qu'à considérer quel jugement la cour doit prononcer, toutes les questions soulevées étant résolues d'une manière favorable au Demandeur, qui du reste a prouvé les allégations importantes de sa déclaration. Je dois dire que les Défendeurs doivent rendre au Demandeur la possession et jouissance du tiers indivis de l'immeuble en question en cette cause aux termes de la déclaration, avec les fruits et revenus depuis leur acte d'acquisition, savoir depuis le 14 janvier 1853. à raison de £32 0 0 par année, ordonnant une expertise pour la valeur de la maison.

La Cour : Considérant que Cécile Maranda, veuve de François Griault dit Larivière, par son testament solennel, fait et reçu à Québec, le vingt-six janvier 1816, pardevant Mtre. Joseph Planté et confrère, notaires publics, donna et légua à sa fille Cécile Griault dite Larivière, et à Etienne Claude Lagueux, mari de cette dernière, l'usufruit et jouissance, leur vie durante, de l'emplacement désigné en la déclaration du Demandeur, savoir : " l'emplacement, maison et dépendances à " elle appartenant, située en la Basse-Ville de Québec, etc.," et légua, par le même testament, la propriété du dit immeuble aux enfants de Cécile Griault dite Larivière, et du dit Etienne Claude Lagueux, qui seraient vivants au décès du dernier des usufruitiers ; Considérant que la testatrice est décédée le ou vers le quatorze juin, 1819, sans avoir révoqué le dit testament, et que, du mariage des dits Etienne Claude Lagueux et Cécile Griault dite Larivière, il est né trois enfants, Joseph Lagueux, Cécile Adélaïde Lagueux, femme Brunet, intervenante, et Henriette Lagueux, femme d'Edouard Glackmayer, mère du Demandeur ; que cette dernière est décédée, le ou vers le dix-neuf mai, 1833, avant l'ouverture en sa faveur du legs en propriété d'un tiers du dit immeuble, attendu que ses père et mère, Etienne Claude Lagueux et Cécile Griault dite Larivière, usufruitiers ne sont décédés, le premier, que le ou vers le trois août, 1842, et la seconde que le ou vers le cinq septembre, 1845, et considérant que Henriette Lagueux a laissé de son mariage avec Edouard Glackmeyer quatre enfants, lesquels étaient vivants lors de l'ouverture du legs en propriété du dit immeuble, et sont encore vivants, savoir : le Demandeur, Edouard Claude Glackmyer, Henri Romuald Glackmeyer et

Alfred Marc Glackmeyer, et qu'en loi ces enfants, par représentation de leur mère, ont droit chacun pour un quart au tiers de l'immeuble en question, et qu'ils tiennent ce droit directement de leur bisaïeule, Cécile Maranda, et non de leur mère ; Considérant que, par l'acte de cession ou transport fait et passé à Québec, le dix-huit septembre, 1857, par devant Louis Prévost et confrère, notaires publics, le Demandeur a acquis de ses frères susnommés tous et chacuns leurs droits et prétentions au legs sus dit, et aux fruits et revenus du dit immeuble, depuis l'ouverture du legs, et qu'il n'a pas été prouvé par l'Intervenante, Cécile Adélaïde Lagueux, que le Demandeur et ses frères aient en aucun temps cédé et transporté à leur père, Edouard Glackemeyer, les dits droits et prétentions, vu que les seuls actes relatifs à ces cessions et transports ne font mention que des droits des enfants dans les successions respectives du dit Étienne Claude Lagueux, Cécile Criault dite Larivière, et de Henriette Lagueux ; que, de plus, la prescription invoquée par l'Intervenante, au moyen d'une possession de dix ans et de trente ans, d'une moitié indivise du dit immeuble, à l'encontre de la réclamation du Demandeur n'est pas légalement prouvée, et que, d'ailleurs, cette prescription de trente ans ne pouvait courir contre les enfants susdits qui étaient mineurs, et que celle de dix ans n'est fondée sur aucun titre ; que, de plus, l'effet de l'obtention d'une sentence de ratification du titre des Défendeurs, qui porte date du vingt-quatre janvier, 1853, n'a été que de purger les droits hypothécaires sur le dit immeuble et nullement de fortifier le dit titre et de purger le dit immeuble de toutes réclamations à la propriété d'icelui ; Considérant qu'il n'est pas prouvé en cette cause que le Demandeur ne soit qu'un prête-nom en faveur de son père, Edouard Glackmeyer ; et considérant enfin que le Demandeur a prouvé sa demande, et que le dit immeuble est admis valoir annuellement en totalité la somme de quatre-vingt seize louis, savoir, depuis le premier février, 1853, jusqu'au jour de la restitution du dit immeuble, et que l'intervenante a complètement failli de prouver et maintenir en loi les allégations de son intervention et de son exception. La cour renvoie la dite intervention et déclare que le Demandeur, tant en son propre nom que comme cessionnaire de ses frères susmentionnés, est le seul, vrai et légitime propriétaire du tiers indivis au total de l'immeuble réclamé sur les Défendeurs ; que les Défendeurs, qui en sont en possession, seront tenus, sous quinze jours de la signification de la présente sentence, de se désister de la possession du dit tiers indivis appartenant au Demandeur, et à le lui remettre, avec les fruits et revenus depuis le premier jour de février 1853, sur le pied de trente deux louis par

année, formant, jusqu'à ce jour, la somme deux cent cinquante trois louis, que cette cour condamne les Défendeurs à payer au Demandeur, avec intérêt de la date de cette sentence ; et, vu que les Défendeurs ont démoli la maison et dépendances érigées sur le dit immeuble, et ont par là diminué la valeur du dit immeuble d'une manière considérable, la cour ordonne que, par des experts dont les parties conviendront, sous quinze jours, sinon nommés d'office par un juge de cette cour siégeant en cour, ou en vacance, à la demande d'une des parties, et par un tiers expert qui sera nommé de la même manière, il sera constaté quelle serait la valeur moyenne de la dite maison et et des dépendances, depuis le premier jour de février 1853, jusqu'à ce jour, si la dite maison et les dites dépendances n'eussent pas été démolies par les Défendeurs, pour, par les experts faire leur rapport par écrit sans délai, et accompagnant icelui des témoignages des témoins que la cour leur permet d'examiner s'ils le jugent à propos pour les fins de la justice avec droit aux experts d'assermenter les témoins, pour être adjugé plus tard sur icelui rapport par cette cour ; vu, de plus, l'alternative accordée par la déclaration du Demandeur aux Défendeurs de payer au Demandeur la somme de mille louis, pour valeur du tiers du dit immeuble, et des fruits et revenus d'icelui jusqu'au trente octobre 1858, acte est par le présent accordé aux Défendeurs du droit qu'ils ont d'exercer cette alternative en payant au Demandeur la somme de mille louis, avec intérêts à compter du trente octobre 1858, ce qu'ils seront tenus d'opter et d'en signifier leur choix au Demandeur, sous huit jours à compter de la signification de la présente sentence à la charge par le Demandeur de passer un titre valide, translatif de propriété du dit tiers d'immeuble en faveur des Défendeurs ; sinon, et les Défendeurs ne voulant pas ou ne signifiant pas par écrit leur intention de profiter de l'alternative susdite, la cour permet au Demandeur de procéder au partage et à la licitation du dit immeuble, suivant la loi, après avoir constaté l'indivisibilité du dit immeuble ; et réserve au Demandeur le droit de prendre à cet égard ses conclusions supplétoires tel et ainsi qu'il avisera, et la cour condamne les Défendeurs au paiement des frais de la présente action, sauf leur recours pour iceux contre l'Intervenante, Cécile Adélaïde Lagueux, et contre Edouard Glackmeyer. (11 *D. T. B. C.*, p. 18.)

LELIÈVRE, pour le Demandeur.

BAILLARGÉ, pour les Défendeurs.

TESSIER, pour l'Intervenante.

NOVATION.—PRIVILEGE DU VENDEUR.

QUEEN'S BENCH, APPEAL SIDE, Québec, 17 décembre 1860.

Before Sir L. H. LAFONTAINE, Bart., C. J., and AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

NOAD et al., Appellants, *and* LAMPSON, Respondents.

Jugé: 1° Que des billets promissoires, signés par le débiteur et payables à l'ordre du créancier, n'opèrent pas, s'ils ne sont payés à l'échéance, une novation de la dette en paiement de laquelle ils ont été donnés, si l'intention de faire novation n'est clairement exprimée par le créancier lors de leur réception.

2° Que les mots "dont quittance," dans un contrat de vente, n'expriment pas dans telles circonstances l'intention de faire novation. (1)

3° Que le vendeur d'une chose, pour partie du prix de laquelle il a reçu les billets promissoires de l'acheteur, payables à ordre, a un privilège, si aucuns des dits billets ne sont pas payés à l'échéance, sur le produit de la vente judiciaire de la chose vendue en la possession du débiteur, sur production de tels billets, pour cette portion du prix représenté par tels billets ou billets ainsi produits et non payés.

4° Que ni l'exercice par l'acquéreur du droit de propriété sur la chose, ni le fait qu'il a réparé cette chose ne détruiront le privilège du vendeur, tant que l'identité de l'objet peut être constatée. (2)

This case came before the Superior Court, for its decision upon the claim of an unpaid vendor to receive, by privilege, as such vendor, the sum of $1760.29 out of the proceeds of the sale, by the sheriff, of the chattel belonging to Defendant J. J. Nesbitt, which had been originally sold to him by the unpaid vendor, Lampson, the Respondent. On the 16th February, 1858, Respondent, William Lampson, by deed before Lemoine, and colleague, notaries, sold to Defendant, Nesbitt, a certain floating-dock, which, on the 29th October, 1859, was sold by the Sheriff, as the property of Nesbitt. The sale from Lampson to Nesbitt was for £4,000, on account of which sum Lampson acknowledged to have received from Nesbitt £1192, the balance being paid, partly by two notes of H. J. Noad & Co., the Respondents, payable to the order of Nesbitt, and by him endorsed, and the residue by two of Nesbitt's own promissory notes payable to Lampson's order, at long and distant periods, one of which was afterwards made payable at a shorter period and then renewed, but all of which notes so made by Nesbitt were dishonored and protested for non payment, leaving the sum of $1760. 29, equal to £440 1 5, being the aggregate amount of the two promissory notes, due and owning by Nesbitt to Lampson on the price of the floating-dock, for which sum Lampson prayed to be collocated by privilege as unpaid

(1) V. art. 1171 C. C.

(2) V. art. 1998 C. C.

vendor, on the proceeds of the floating dock. Lampson's claim was contested by Noad *et al.*, Opposants *à fin de conserver*. In their peremptory exception, the sale by Lampson, and the making, signing and delivery of the several promissory notes by Nesbitt were set forth in detail, but it was alleged therein that those promissory notes were taken and received in full payment of the price of the floating-dock, and that thereby a novation was operated of the debt originally due to Lampson, and, consequently, that his privilege as unpaid vendor had never any existence. It also alleged that, by an instrument passed before Bignell and colleague, notaries, on the 15th February, 1858, (being the day previous to the sale by Lampson to Nesbitt,) Nesbitt borrowed from H. J. Noad & Co., a sum of £1500, and by way of security for the repayment of that sum pledged the floating-dock to them. It was in evidence that, a day or two afterwards (the 17th February,) one of the firm of Noad & Co., Jeffrey, accompanied by Grant, their book-keeper, and Bignell, N. P., went to Diamond Harbour, where they found Nesbitt, and then, they all standing at some distance, but in sight of the dock, Nesbitt said, speaking to Jeffrey : "There is the floating-dock, I deliver it to you in pledge, as promised." The parties then left without more to do. It was likewise alleged by Noad et al., in their peremptory exception, that Nesbitt "from and since the day first aforesaid, (the 17th February, 1858,) hath used the said floating dock in the prosecution of his trade and business." No opposition to the seizure and sale by the sheriff of the floating-dock was at any time made by or on behalf of Noad et al., as pledgees thereof. No change whatever took place respecting the dock. Nesbitt deposed that after "February, 1858, repairs were made by him to the dock ; the repairs to the dock were occasioned by the moorings of the dock having been either broken or cast adrift, during the night-time, in a gale of wind in the high spring tides, which altered the position of the dock, and she grounded in a critical position. I repaired the dock on that occasion. I added a good deal of iron to the floating-dock and caulked it a good deal ; there was some timber of the dock broken up but it was not replaced."

BOWEN, Chief Justice, in rendering the judgment of the Superior Court, appealed from, said the questions of law to be decided were : First. Whether the taking of the promissory notes in question, by Lampson, operated as a novation of the debt, and barred him from the privilege of the unpaid vendor of the said floating-dock. Secondly. Whether the circumstance of Nesbitt having made some trifling repairs to the dock destroyed its identity so as to exclude Lampson from the privi-

lege which he claimed as unpaid vendor thereof. " La novation " est la substitution d'une nouvelle dette à une ancienne. L'an- " cienne est éteinte par la nouvelle qui est contractée en sa " place ; c'est pourquoi la novation est comptée parmi les " manières dont s'éteignent les obligations." (1) No. 585 : " Il " résulte de la définition que nous avons donnée de la nova- " tion, qu'il ne peut y avoir de novation qu'il n'y ait eu deux " dettes contractées, dont l'une soit éteinte par l'autre qui lui " est substituée. De là il suit que si la dette dont on veut " faire novation par un autre engagement, est une dette condi- " tionnelle, la novation ne pourra avoir lieu que lorsque la " condition existera. C'est pourquoi si la condition vient à " manquer, il n'y aura point de novation, parcequ'il n'y aura " point eu de première dette à laquelle la nouvelle ait pu être " substituée." In this case, the condition upon which the notes were accepted in payment, was that they should be paid at maturity ; being dishonored the condition never was accomplished, consequently, there was no novation of the original debt or anything equivalent to payment ; it remained in its full force, with all its privileges attached. No. 594 : " Il faut " pour la novation une volonté de la faire dans la personne " du créancier, ou dans celle qui a pouvoir de lui, ou qualité " pour faire la novation en sa place.... Personne ne doit " facilement être présumée abdiquer les droits qui lui appar- " tiennent. C'est pourquoi la novation renfermant une ab- " dication que le créancier fait de la première créance à " laquelle la seconde est substituée, cette novation ne doit " facilement se présumer et les parties doivent s'en expliquer. " No 596 : Si le nouvel engagement, fait sans l'intervention " d'une nouvelle personne, ne contient rien de différent du " premier, il est évident que ce nouvel engagement est " inutilement contracté. No 199 : Au surplus cette décision " de la Cour de Paris ne peut se soutenir. Il est faux que " dans l'espèce il y eût novation, et que le vendeur eût été " payé dans le sens de la loi. Quoiqu'il y ait des arrêts assez " nombreux qui ont décidé que la dation de billets opère une " libération et conduit à fin le contrat de vente, on ne doit " pas les suivre, et il faut se ranger à l'opinion beaucoup plus " juridique qui veut que le paiement en billet soit toujours " subordonné à la condition de l'encaissement. C'est ce qu'ont " décidé plusieurs arrêts, parmi lesquels je citerai un arrêt de " la Cour de Nancy, du 4 janvier 1827, rendu après une dis- " cussion approfondie, et sur mes conclusions conformes. Il " est clair que le créancier qui reçoit un pareil paiement n'en- " tend donner quittance qu'à la charge que les billets seront

(1) Pothier, *Oblig.* n° 581.

" payés à l'échéance. La novation ne se suppose pas; et pour " y arriver, il ne faut pas surtout fausser la pensée des parties " contractantes." (1)

The foregoing authorities sufficiently establish that, in this case no novation of the debt due by Nesbitt to Lampson was operated by the acceptance of the promissory notes in question; and an authority can be shewn where the original purchaser of a chattel, not having paid his vendor, sold to another who paid him, which second purchaser also sold to a third person who paid him, the original vendor was, nevertheless, maintained in his privilege and allowed to revendicate the chattel then in question. Upon these principles and the weight of the foregoing authorities, I hold that Lampson is not debarred from the exercise of his privilege upon the proceeds of the floating-dock sold in this cause. I now proceed to examine the second question presenting itself for consideration. It was urged by Noad *et al.*, that the repairs made by Nesbitt constituted such an exercise of property by him over the dock as to defeat Lampson's claim, and the case of *Tétu et al.*, vs. *Fairchild et al.*, and divers Opposants, 5 *R. J. R. Q.*, p. 101, was cited by them as being in point. There the question presenting itself had reference to the identity of goods which had been sold by Plaintiffs to Defendants, and though those goods had been taken out of the bales, had been placed on the shelves of Defendants' shop, for sale, and had been mixed up with other goods belonging to them bought from other parties, Plaintiffs sought to exercise the privilege claimed in this case. Their demand was dismissed, on the ground that the goods; over which such a privilege is claimed must be, in the language of the old writers " sous cap et queue." In that case it was almost impossible to identify any portion of the goods; here, on the contrary, the dock is easily identified, no alteration of any consequence whatever having been made to it. On a careful examination of the principles laid down in that case, it will be seen that the judgment about to be rendered in this case is by them fully supported. The case of the *Union Building Society* vs. *Russell*, (2) also maintains the view taken of this case. I refer, however, to one case in Troplong, where a party selling an ingot of silver as a privilege upon the dishes made out of it, because they can be restored and again be made into an ingot of silver. So long as identity can be established, so long does the privilege exist. (3) Under these circumstances I have come to the conclusion that Lampson's opposition is well found-

(1) Troplong, *Priviléges et hypothèques*, n° 199 *bis*.

(2) 5 R. J. R. Q., p. 308.

(3) Troplong, *Priviléges et hypothèques*, n° 113 notes.

ed, and that he is entitled to the privilege which he claims. It was from this judgment that Noad *et al.* appealed.

AYLWIN, Justice, *dissenting :* I concur in the opinion of the majority of the court to some extent, but differ on some points. The first question is as to whether the right of pledge exists, and I think it manifestly does not. The contract with Appellants bears date the day before the sale to Nesbitt by Lampson, and two days afterwards a view is taken of the dock by one of Appellants. But the dock was never in their actual possession as pledgees, or under their control; it remained in the possession of Nesbitt, who went to considerable expense in repairing it. If Appellants are deprived of their pledge, they have no one but themselves to blame; no privilege was required by them subsequent to Lampson's. As to the words *dont quittance* in the deed of sale, I am satisfied they apply as well to the notes as to the cash. Lampson knew that Nesbitt had applied to Noad *et al.* to obtain cash on the dock, and that any loan for repairs would of necessity confer a privilege. In interpreting the article of the Custom, we must take care not to give greater rights to the unpaid vendor than he had under the Roman law. Mere delivery without payment of the price does not vest the property in the vendee; nor are the vendor's privileges to be carried out indefinitely, but are subject to great restrictions, as where the goods are not "*sous balles et sous cordes,*" or have been placed upon shelves with other goods, so that they cannot be identified. In *Tétu* vs. *Fairchild*, that was the decision, and I approve of it; for, in view of the state of the law in Lower Canada, it is necessary that some restriction should be placed on the exercise of the unpaid vendor's privilege. In this case, it is evident Appellants' privilege as pledgees, ceased long since in favor of the unpaid vendor, and that by the words *dont quittance* the Respondent relinquished his claim and made it a mere personal debt. Neither of the parties has, therefore, any privilege, and they should be collocated concurrently *au marc la livre.*

MEREDITH, Justice: I think the judgment of the court below is, in principle, right. The french authorities establish, and the courts here have invariably held, that the taking of a promissory note on account of a debt, does not cause a novation of such debt; and this on the ground that a promissory note is considered to be received subject to the condition of payment, *subordonné à la condition de l'encaissement.* The use of the dock by Nesbitt, and the changes (such as they were) made in it, did not defeat the privilege of the unpaid vendor; because they did not affect the identity of the thing sold, or interfere, in any material degree, with the means of

establishing that identity. Nor do I think, even assuming that the dock was legally pledged by Nesbitt to the Appellants with the knowledge of the Respondent, that the creation of that right of pledge defeated the privilege of the unpaid vendor. Even if the right of the pledgee had continued in full force until the moment of the sale, the right of the unpaid vendor might still have been exercised, if the amount levied had been more than enough to satisfy the pledgee; because, even in that case, the property pledged would have had to be seized and sold as belonging to the pledger, (1) and the case would thus come within the words of the 177th article of the Custom: "Si la chose se "trouve saisie sur le débiteur par un autre créancier il peut em-"pêcher la vente, et est préféré sur la chose aux autres créan-"ciers." Ferrière, in his commentary on this article, puts the question: "Si le vendeur à terme est préféré au créancier de l'a-"cheteur à qui la chose vendue a été baillée en gage?" Bacquet is of opinion that in such a case the unpaid vendor ought to have the preference; whereas Ferrière and Brodeau think the pledgee ought to be preferred to the unpaid vendor; but none of the commentators on the article in question are of opinion, as contended by the Appellants, that the pledging of a thing purchased on credit, is the exercise of such a right of property in it, as to defeat the privilege of the unpaid vendor. The fact that Lampson knew of the intention of Nesbitt to pledge the floating dock is unimportant; because Lampson having given credit for the price, could not, even had he been so disposed, have prevented Nesbitt from pledging the thing purchased. Nesbitt could have sold the floating dock, without the consent of Lampson, and *à fortiori* he could pledge it. Being then, as I am, of opinion that Lampson's privilege as unpaid vendor has not been defeated either by novation or otherwise, and that the Appellants, if they ever had the right of pledge upon the floating dock in question, had lost that right before the time of the sale in this cause, I thing the judgment of the court below right, as to the matters really in controversy between the parties; but as the learned counsel for the Appellants has pointed out, an error has crept into the judgment as to a matter of detail. The floating dock and appurtenances were sold for £4000. Other things described in the deed as the "half stock," were sold for £189 11 10. The balance remaining due upon the whole is £442 1 10. Assuming, as I think we must do, that the payments made on account amounting to £3749 11 10, are to be imputed rateably on the sum of £4000, and on the sum of £189 11 10, already mentioned,

(1) Troplong, *Gage*, N° 458, vol. 19, p. 420; Pigeau, I vol., p. 660.

the balance now remaining due on the £4000, would be £420 1 9, and it is for that sum only that the Respondent has a right to be collocated by privilege on the proceeds of the float-dock. To this extent the judgment of the court below will have to be modified. Judgment confirmed. (11 *D. T. B. C.*, p. 29.)

VANNOVOUS, for Appellants.

CAMPBELL and KERR, for Respondent.

VENTE.—GARANTIE.—EVICTION.

BANC DE LA REINE, EN APPEL, Montréal, 1er décembre 1860.

Présents : Sir L. H. LAFONTAINE, Bart. Juge en Chef, AYLWIN, DUVAL, MEREDITH et MONDELET, Juges.

LACOMBE, Appelant, *et* FLETCHER, Intimé.

Jugé : Que l'acheteur d'un héritage qui a accepté le transport de son prix d'achat, ne peut opposer, à l'encontre de la réclamation du cessionnaire, la demande en délaissement portée contre lui, tant qu'il n'y a pas dépouillement judiciaire et éviction complète.

Le 17 février 1851, l'Appelant vendit à Benjamin Séguin une terre située à Rigaud. Le 21 février 1857, Séguin ne pouvant payer le prix convenu, rétrocéda la terre aux conditions, 1° par le rétrocédant de demeurer quitte envers le rétrocessionnaire de la balance qui restait due à ce dernier, et 2° en outre pour la somme de £50, dont £12 10 payés comptant par l'Appelant, qui promit payer la balance de £37 10, pour l'acquit de Séguin, à l'Intimé, à qui l'Appelant consentit une reconnaissance devant les mêmes notaires qui avaient reçu l'acte de rétrocession. L'Appelant, poursuivi plus tard en déclaration d'hypothèque pour dettes crées par Séguin, fit sa déclaration de délaissement. Poursuivi ensuite par l'Intimé pour le recouvrement de la somme de £37 10, il lui opposa, et les hypothèques pour lesquelles il avait été poursuivi, et le délaissement qu'il avait fait. L'Intimé répondit que ce délaissement ne pouvait lui être opposé, vu l'engagement personnel de l'Appelant à son égard ; que, d'ailleurs, l'Appelant avait reçu de Séguin, avant la rétrocession, une somme de 5486 liv. 16 sols, qui devait suffire pour mettre l'Appelant en état d'acquitter cette poursuite hypothécaire. Le 15 novembre, 1859, la Cour Supérieure, à Montréal, prononça le jugement qui suit : " La Cour, considérant que les conventions et stipulations de l'acte de rétrocession passé entre le Défendeur (l'appelant) et Benjamin Séguin, ne peuvent affecter la réclamation du Demandeur, ni lui, le Demandeur, qui n'était pas partie au dit acte, ni annuler ni mettre de côté l'engagement personel du Défendeur par lui consenti au Demandeur,

par et en vertu de son billet ou reconnaissance en date du 21 février, 1857, et pour le montant duquel le Défendeur est poursuivi dans cette action ; et, considérant que le Défendeur ne s'est aucunement relevé de son engagement, condamne le Défendeur à payer au Demandeur la somme de £37 10, etc." L'Appelant porta sa cause en appel et le jugement de la Cour Supérieure fut confirmé." Le Juge-en-Chef, en rendant le jugement, déclara, comme motifs de cette confirmation, que l'Appelant était demeuré en possession de l'immeuble, nonobstant sa déclaration de délaissement qui n'avait été suivie d'aucune autre procédure, pas même de la nomination d'un curateur. et que le titre de l'hypothèque même n'avait pas été produit. Le Juge MONDELET observa qu'il faut dépouillément juridique, suivant l'opinion de Toullier, vol. 3, no 319. (11 *D. T. B. C.*, p. 38.)

DORION, DORION et SENÉCAL, pour l'Appelant.

MOREAU, OUIMET et MORIN, pour l'Intimé.

VENTE.—GARANTIE.—HYPOTHEQUE.

COUR SUPÉRIEURE, Montréal, 30 novembre 1860.

Présent : BERTHELOT, Juge.

McCARTHY et al., Demandeurs, *vs.* SENÉCAL Défendeur, *et* SENÉCAL, Demandeur en garantie, *vs.* BONNEAU et. al., Défendeurs en garantie.

Le Défendeur, dans une action hypothécaire, porta une action en garantie contre quatre de ses six vendeurs, responsables en garantie, en vertu de leur acte de vente, de la réclamation du Demandeur principal ; l'action en garantie fut discontinuée quant à l'un des Défendeurs en garantie.

Jugé : 1° Que sous l'acte de vente, chaque co-vendeur vendait seulement sa propre part, ou portion héréditaire, dans la succession de son ancêtre, et n'était responsable dans une action en garantie que jusqu'à concurrence de telle part, l'obligation de garantie étant divisible *quoad damnationem*, et les trois Défendeurs en garantie furent condamnés à indemniser le Demandeur en garantie jusqu'à concurrence de la moitié de la dette hypothécaire, étant un sixième pour chaque Défendeur, avec dépens de la demande en garantie jusqu'à l'enfilure du plaidoyer, en autant que les Défendeurs, par tel plaidoyer, avait fait offre de consentir à ce que jugement fût rendu contre eux pour moitié de la somme réclamée par l'action principale. (1)

2° Que l'hypothèque est indivisible en autant qu'il s'agit de l'immeuble hypothéqué. (2)

BERTHELOT, Juge : Les Demandeurs, comme représentants et légataires de Moses Hart, du district des Trois-Rivières, poursuivent, par action hypothécaire, le Défendeur principal,

(1) V. art. 1103 et 1508 C. C.

(2) V. art. 2017 C. C.

sur un jugement obtenu par Moses Hart contre François Denant, affectant hypothécairement un immeuble que ce dernier vendit à Léonard Bonneau, père et beau-père des Défendeurs en garantie, et possédé au jour de l'action principale par Pierre Senécal. Ce dernier a acquis par acte du 19 mars 1860, reçu devant M. Lanctot et confrères, notaires, de : 1° Léandre Bonneau, 2° Norbert Bonneau, 3° Moïse Livernois, pour Suzanne Bonneau, son épouse, 4° Joseph Piédalue, agissant pour ses trois enfants mineurs issus de son mariage avec Eulalie Bonneau, et 5° pour Ermine Bonneau épouse d'Hubert Lefêvre, ses beau-frère et belle-sœur, et 6° Philomène Bonneau, épouse de Jérémie Lambert, ses beau-frère et belle-sœur, pour lesquels il se fit fort, et par qui il promit faire ratifier. Les susnommés se disent vendeurs du dit immeuble, comme leur appartenant du chef et de la succession des feus Léonard Bonneau et Suzanne Robidaux, leurs père et mère, pour le prix de 2400 livres, faisant 400 livres pour chacune des six parts. Le Défendeur principal étant ainsi poursuivi hypothécairement, n'a appelé en garantie que quatre de ses vendeurs : Léonard Bonneau, Norbert Bonneau, Moïse Livernois, et sa femme, Suzanne Bonneau, et Joseph Piédalue. Et il a conclu contre eux à une condamnation solidaire pour toute la demande hypothécaire. L'action a été discontinuée quant à Piédalue, sur exception préliminaire par lui plaidée. Les trois autres Défendeurs ont plaidé qu'ils n'avaient pas vendu solidairement, et que n'ayant vendu que comme héritiers et représentants de leurs père et mère, ils n'avaient vendu que chacun leur part dans l'immeuble de même qu'ils ne devaient avoir que chacun un sixième du prix, c'est-à-dire 400 livres, ainsi qu'exprimé au contrat, et que par conséquent, le recours en garantie devait se diviser entre eux. Ils ont en outre plaidé et prétendu que les Demandeurs principaux ne leur ayant jamais fait connaître avant l'action hypothécaire intentée, qu'ils étaient les légataires et représentants de Moses Hart, et que, n'ayant jamais eu de domicile élu dans le district de Montréal pour recevoir le paiement de leur créance, ils ne devaient pas être reçus dans leur demande, au moins quant aux frais Mais, en cela, les Défendeurs ont tort, parce que les Demandeurs ont succédé à Moses Hart à titre universel, et que ce dernier avait eu son domicile en dehors du district de Montréal, au lieu même où résidaient les Demandeurs au temps où la créance a été contatée, et reconnue existant au profit de Moses Hart à qui elle était due, et que, par conséquent, il n'y avait eu aucun changement de domicile de la part du créancier, ou du lieu où le paiement devait ou pouvait être fait. Sur la question de la divisibilité ou non-divisibilité de l'exercice du recours en garantie, contre plusieurs

vendeurs, ou les héritiers et représentants du même vendeur, les auteurs sont assez partagés. Ils paraissent l'être moins, ou plutôt, s'accordent assez à dire, que, bien que le principe de l'indivisibilité de l'obligation semble être incontestable, lorsqu'il s'agit de la tradition de la chose, il en doit être autrement lorsqu'il s'agit du recours à être exercé pour, ou par remboursement d'une condamnation pécuniaire qui a été subie par l'acquéreur, pour la dette des co-vendeurs ou des co-héritiers du vendeur. Toute la doctrine sur cette question me semble clairement résumée par *Duranton*, au No. 264 du volume 11e, ou il parle de l'obligation indivisible *quoad petitionem*, mais divisible *quoad executionem*, et par cela même divisible *quoad damnationem*. Tel est le cas où un vendeur " qui doit la garantie à l'acheteur vient à mourir laissant plusieurs héritiers, " et que l'acheteur est troublé par un tiers dans sa jouissance. " Cet acheteur peut les mettre tous en cause, ou n'en appeler " qu'un seul ; mais qu'il n'en appelle qu'un ou qu'il les appelle " tous, la condamnation aux dommages-intérêts, s'il y a éviction, n'a toujours lieu que divisément, en proportion de la " de la part héréditaire de chacun d'eux, de manière que celui " qui a payé la sienne est libéré." Et il ajoute : " Telle est l'explication que Cujas donne du traité de la loi Romaine sur " ce point ; et Pothier, dans son contrat de vente, No. 111, dit " pareillement que l'appel en garantie, par l'acheteur troublé, " ou l'action en garantie après l'éviction subie, est bien à la " vérité indivisible quant à la demande, mais non quant à la " condamnation, c'est-à-dire, que l'acheteur peut assigner un " seul des héritiers du vendeur, ou tous à son choix, parce que " l'obligation de faire jouir est un fait, par conséquent, une " obligation indivisible, mais que les effets de cette obligation " sont divisibles entre les héritiers du vendeur, et, dès lors, " que chacun d'eux ne doit être condamné à payer les dommages-intérêts que pour sa part. Toutefois," ajoute Pothier, " si celui qui est attaqué seul, n'appelle pas ses co-héritiers, il " supporte seul les dépens de l'instance, s'il succombe." Je ne vois pas qu'il pourrait en être autrement dans le cas de co-héritiers qui ont vendu leurs parts héréditaires dans un immeuble, avec la convention que chacun devait recevoir un sixième du prix stipulé, sans s'obliger formellement à une garantie solidaire entre eux. La question paraît d'ailleurs avoir été résolue dans le même sens, par un jugement de cette cour (rapporté à la page 46 de 6 *R. J. R. Q.*,) dans une cause de *Marteau* vs. *Tétreau*. Le jugement devra donc être rendu hypothécairement pour toute la somme due, l'hypothèque étant indivisible quant à l'immeuble possédé par le Défendeur principal ; mais sur la demande en garantie de ce dernier contre trois des co-vendeurs, le jugement ne sera que pour la moitié,

ou chacun un sixième. Quant aux frais de l'action en garantie, les Défendeurs ayant offert de laisser prononcer une condamnation contre eux pour la moitié de la somme demandée, et le Demandeur en garantie ayant persisté dans ses prétentions d'invisibilité de son recours en garantie, ils ne doivent être condamnés aux frais de cette action que jusqu'au jour de la production de leur plaidoyer. Pour le surplus des frais de la Demanderesse, ils devront les payer en entier, et non pour moitié seulement, suivant ce que dit Pothier, au No 110, *Contrat de vente :* " Lorsque " l'acheteur n'a appelé en garantie que l'un des héritiers du ven- " deur, celui qui a été appelé a lui-même intérêt d'appeler en " cause ses co-héritiers pour qu'ils soient tenus de défendre con- " jointement avec lui, afin qu'ils partagent avec lui les frais de la " défense de la cause ; autrement s'il se défendait seul sans les " appeler, il supporterait seul les dépens. " Les trois Défendeurs poursuivis auraient dû mettre en cause leurs trois autres co-vendeurs et co-héritiers, pour obtenir la division des frais de l'action.

JUGEMENT : " déclare le lopin de terre affecté et hypothêqué " au paiement de £132 4 6, et condamne le détenteur, hypo- " thécairement, à payer aux Demanderesses.... et aux dépens " de cette action, dans les proportions suivantes ;.... si mieux " n'aime etc.... et considérant que les Defendeurs en garantie " ne sont pas obligés solidairement, à la garantie par l'acte de " vente du 19 mars, 1860, au Defendeur principal, par eux et " leurs co-vendeurs y nommés, et qu'il y est suffisamment ex- " primé et apparent qu'ils vendaient leurs parts héréditaires, " condamne les Défendeurs, Léandre Bonneau, Norbert Bon- " neau, et dame Suzanne Bonneau, trois des vendeurs au sus- " dit acte, à garantir et indemniser le Défendeur principal sur " sa demande, jusqu'à concurrence de la somme de £66 2 3.. " et aux frais de la demande principale, et de ceux de la " demande en garantie jusqu'au jour de l'introduction de leur " plaidoyer, et aux frais de leur contestation depuis l'introduc- " tion du plaidoyer. " (11 *D. T. B. C.*, p. 41.)

LANCTOT, for principal Plaintiff and for Defendant *en garantie.*

M. MARCHAND, for principal Defendant and for Plaintiffs *en garantie.*

MANDAT.—COMMIS.

SUPERIOR COURT, Montréal, 30 octobre 1860.

Before BADGLEY, Justice.

SEYMOUR *et al. vs.* WOODBURY.

Les Demandeurs ayant appris que l'un de leurs débiteurs à la campagne recélait frauduleusement ses effets, envoyèrent un commis sur les lieux pour s'en enquérir, ne lui donnant aucune instruction spéciale ou aucune autorité. Le commis prit le billet du débiteur pour 5s. dans le louis, lequel les Demandeurs refusèrent.

Jugé: Dans une action pour la dette originaire, que le reçu et la quittance ne liaient pas les Demandeurs, le commis ayant excédé son autorité.

This action was commenced by *capias ad respondendum.* The declaration set up an indebtedness for goods sold and delivered, and that, for such goods, a promissory note for $938.60, was given to plaintiffs. The Defendant pleaded *novation* by settlement with Plaintiffs' clerk, and produced a receipt dated four days previous to the institution of the action, signed by the clerk, in the following terms: " Received from C. E. " Woodbury, by note at four months, the sum of two hundred " and forty dollars, in full of all claims and demands to date. " SEYMOUR, WHITNEY & Co., per pro.. J. THAYER, Jr." The Plaintiffs replied that they had never authorized such receipt, and that the debt was not novated.

BADGLEY, J.: This cause rests on the point whether Plaintiffs' clerk had authority to bind his employers by taking a note for about 5s., in the pound of the original debt. He is the only witness examined, and I am clearly of opinion he had no such authority. His employers received notice that one of their debtors in the place where Defendant lives was making away with his property, without saying who the debtor was; the witness was sent out to make enquiries only, and without any orders or instructions to arrange or compromise. The clerk sees Defendant who tells him that, unless 5s. in the pound were taken by note, his employers would get nothing, and, upon this, a note was taken and the receipt in question given. But the employers repudiated the whole matter, sent back the note, and sued for their original debt, for which they must have judgment. (11 *D. T. B. C.*, p. 71.)

ABBOTT and DORMAN, for Plaintiff.

DOHERTY, for Defendant.

INSCRIPTION POUR PREUVE.

QUEEN'S BENCH, APPEAL SIDE, Montreal, 7th December, 1860.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

LIONNAIS, Appellant, *and* GUYON dit LEMOINE, Respondent.

Jugé : Qu'une inscription pour preuve et audition aux mérites sur une exception de prescription, et de vente de droits litigieux, est irrégulière, icelle étant une inscription partielle, faite sans la permission de la Cour. (1)

In this cause, which was brought in the Superior Court, Montreal, an exception of prescription, and sale of litigious rights, was filed, with other pleas by Defendant who inscribed the cause for proof and hearing on the merits of the exception only, the same day Plaintiff inscribed for proof and hearing on the merits of the cause generally. The Superior Court, BADGLEY, Justice, by judgment of the 30th November, 1860, dismissed Defendant's motion to reject Plaintiff's inscription, and granted the motion of Plaintiff to reject the inscription made by Defendant. On a motion for a writ of appeal from this judgment, the Court of Appeals rendered the following judgment : " THE COURT, considering that the inscription on " roll *d'enquête* by Hardoin Lionnais for the adduction of " evidence, and for final hearing on the merits of the exception alleging prescription and a sale of litigious rights, " without including in such inscription the other issues raised " in the cause, was irregular inasmuch as such partial inscription was made without leave of the Court, and that Lionnais " hath offered no valid reason in support of his motion for " leave to appeal to this court ; doth order that Lionnais take " nothing by his motion." (11 *D. T. B. C.*, p. 73.)

LEBLANC and CASSIDY, for Appellant.

FLEMING, for Respondent.

SERVITUDE.—DROIT DE VUE.

SUPERIOR COURT, Montreal, 31st December, 1860.

Before BERTHELOT, J.

ROBERT, Plaintiff, *vs.* DANIS et al., Defendants.

Dans une action portée par le propriétaire d'un terrain dans la cité de Montréal, contre des propriétaires voisins, pour les obliger à fermer une ouverture qu'il disait exister dans leur pignon, et qui avait vue droite

(1) V. art. 243 C. P. C.

sur la propriété du Demandeur, il fut constaté que l'étage inférieur de la maison des Défendeurs était à environ neuf pieds d'une ancienne clôture de division entre les propriétés des parties, mais que le second étage récemment érigé venait jusqu'à la clôture de division, avec un passage en dessous. Il n'y avait aucune ouverture dans le second étage ayant vue sur le terrain du Demandeur, mais au-dessous et entre cet étage et le haut de la clôture, il y avait une ouverture qui avait vue sur le terrain.

Jugé : 1° Que l'ouverture était en contravention à l'article 302 de la Coutume de Paris. (1)

2° Que le juge, en pareil cas, fera une descente sur les lieux, s'il en est requis par les parties.

This was an action brought by a proprietor of a house and lot in St. Joseph Street, Montreal, against his neighbours, Defendants, to cause them to close up an opening alleged to exist in the north east gable of their house, on the line of division between the respective properties of the parties, by which a direct view was had upon Plaintiff's premises. The plea set up that there was no such opening in the gable of Defendants' house; that there was a division fence ten feet high between the properties, along their whole depth: that the lower story of Defendants' house was built at nine feet from the fence, that the gable of the second story came up to the division line, leaving a passage under the second story from the street, and that this second story had no opening in it towards the Plaintiff's premises.

BERTHELOT, Justice: said that, at the request of the parties, he had twice visited the place. Below the second story of Defendants' building, there was a space of opening left between it and the stop of the old fence, in the line separating the respective properties. This opening probably left to give light to the passage had been closed up with boards by Plaintiff, which had been removed by Defendants. He held the action well founded, and judgment must be given for Plaintiff, but only for nominal damages under the circumstances.

JUGEMENT : " Considérant qu'il y a preuve suffisante que les " Défendeurs ont converti et exhaussé la clôture vicinale entre " leur héritage et celui du Demandeur, de manière à en former " le pignon nord-est de leur maison sur leur héritage, dans " lequel pignon il paraît qu'ils ont laissé une ouverture, au- " dessous du second étage de cette partie de leur maison qui " conduit de la rue à leur cour, au moyen de laquelle ouver- " ture ils ont une vue droite sur l'héritage du Demandeur, ce " qui est contraire à la loi et à l'article 202 de la Coutume de " Paris; condamne les Défendeurs à fermer etc., et en outre à " cinquante chelins de dommages." (11 *D. T. B. C.*, p. 74.)

LAFLAMME, R. and G., for Plaintiff.

LEBLANC and CASSIDY, for Defendants.

(1) V. art. 536 C. C.

COURS D'EAU.—MOULINS.—DOMMAGES.

SUPERIOR COURT, Montreal, 31 octobre, 1860.

Before SMITH, J.

PANGMAN *vs.* BRICAULT DIT LAMARCHE et al.

Dans une action portée par un seigneur, alléguant son titre et son droit de banalité, concession à l'un des Défendeurs d'une terre dans sa seigneurie, avec clause dans le contrat qu'aucun moulin ne serait erigé; que les Défendeurs, associés, avaient construit un moulin à scie sur une rivière non navigable avoisinant le terrain concédé, et avait érigé une chaussée sur la rivière, qui faisait refluer les eaux sur le moulin à scie et le moulin à farine du Demandeur qui avaient été en opération pendant plus de trente ans, et qui empêchait le fonctionnement des moulins et causait de grands dommages.

Conclusion : Qu'il fut déclaré que les Défendeurs n'avaient aucuns droits d'ériger un moulin à scie ou aucun autre moulin, que la chaussée fut démolie et les Défendeurs condamnés en dommages.

Jugé: Que par le statut de la 20e Vict., ch. 104, le Demandeur n'avait pas droit à des conclusions en démolition; qu'il n'avait aucun droit à l'usage exclusif des eaux; et que les Défendeurs étaient responsables des dommages causés par la hauteur de leur chaussée, ou autrement.— Expertise ordonnée afin de constater si la chaussée et autres ouvrages des Défendeurs causaient des dommages au Demandeur, et pour en estimer le montant, si aucun il y avait. (1)

The plaintiff, in his declaration, alleged that he was proprietor and in possession of the seigniory of Lachenaie, with the right of *banalité* by law, and by his titles of concession, and had possession, for more them thirty years, of a *moulin banal*, on the river *L'Achigan*, a river non-navigable, also a saw mill adjacent; that the Defendants were both *censitaires* of Plaintiff, and that, in the deed of concession to one of Defendants, *Pichette*, of a lot a land on the river, there was a clause that no grist or other mill should be erected, that Defendants formed a copartnership, by notarial act of the 2d January, 1857, to carry on a saw mill erected by them on Pichette's land, at about fifteen arpents below Plaintiff's mills; that they had made a dam across the river, and, in January, 1857, had raised the dam, and, by means of their works, caused the water to flow back, so as to impede Plaintiff's mills, and had maintained the dam and used their saw mill, notwithstanding the remonstrances and protests of Plaintiff, and to his damage to the extent of £2000. Conclusion: that it be declared that Defendants had no right to erect the saw mill or any mill on the lot, and for the demolition of the dam, and for damages. The plea set up that the mill was built by Pichette on his own lot, that, as proprietor *riverain*, he had a right to build it, and to make use of the water; that, under the laws in force, the

(1) V. art. 5535 et 5536 S. R. Q.

condition in deed of concession, that no mill should be built was of no force, that Defendants had taken away a part of their dam in April, 1857, and that Plaintiff had sufficient water for his mills, and had suffered no damage.

SMITH, Justice: Held, that Plaintiff was precluded by the statute 20th Vict., cap. 104, from his action *en démolition*. The statute was in some respects confused, but he held Defendants had a right to build a mill and make use of the water running past their mill, but were responsible for any damage thereby caused to Plaintiff: *expertise* ordered.

JUGEMENT: "La Cour, considérant que le Demandeur n'a pas établi qu'il eût un droit exclusif à l'usage des eaux de la rivière mentionnée; et qu'aux termes du statut 20 Vict., cap. 104, les Défendeurs étaient autorisés à utiliser et exploiter le cours d'eau qui borde leurs propriétés à cet endroit, et a y construire la dite digue ou chaussée, mais qu'en utilisant et exploitant le cours d'eau, les Défendeurs sont néanmoins garants de tous dommages qui pourraient en résulter à autrui, soit par la trop grande élévation des écluses, ou autrement, ordonne avant faire droit, que par experts, etc. (11 *D. T. B. C.*, p. 76.)

CHERRIER, DORION and DORION, for Plaintiff.

BONDY and FAUTEUX, for Defendants.

ACTIONS PERSONNELLES.—COMPETENCE.

SUPERIOR COURT, Montreal, 31 December, 1861.
Before BERTHELOT, J.

CHAPMAN *et al.*, Plaintiffs, *vs.* NIMMO, Defendant, and THE PHŒNIX ASSURANCE CO., Garnishees

Le Défendeur résidait à Brantford, dans le Haut-Canada, les Demandeurs le poursuivirent dans la Cour Supérieure à Montréal, l'action fut commencée par un writ de saisie-arrêt entre les mains de la Compagnie d'Assurance, la Phœnix, le Demandeur ayant été sommé sous les provision de la 12me Vict., ch. 38, sec. 84, comparut par procureur, et plaida par exceptions déclinatoire et à la forme.

Jugé: Que les tiers-saisis, lors du service du writ sur eux, étant endettés au Défendeur en une certaine somme d'argent, les Demandeurs avait droit de poursuivre le Défendeur dans le district de Montréal, et que les deux exceptions devaient être déboutées. (1)

In this cause a writ of *saisie-arrêt* before judgment was issued on the 5th March, 1860, which was served on the same day on the *tiers-saisis*, by delivering the same to the manager of the company, at their place of business, in Montreal, between four and five of the clock in the afternoon. The *tiers-*

(1) V. art. 34 et 69 C. P. C.

saisis appeared and made their declaration, to the effect that they had nothing in their hands belonging to Defendant, adding: " And states that a claim for $4000 was due to James " Nimmo, Jr., by the *tiers-saisis*, but, previous to the service " of the writ of attachment in this cause, the agent of the " *tiers-saisis*, at Brantford, Canada West, had been instructed " to pay it, which he did on 6th March instant, by a draft on " Gillespie, Moffott & Co., the general agents of *tiers-saisis*, at " three days sight." The Defendant being called in, by the usual notice, appeared by counsel, and filed a *declinatory exception*, also an *exception à la forme*, based upon allegations that he had no domicile or property in Lower Canada; that his domicile was at Brantford, in Canada West; that the cause of action did not arise within Lower Canada, and that no legal service of process was made. The only witness examined was James Davison, manager, in Montreal, of the Assurance Company; he was called by Plaintiffs. It appeared, from his deposition, that the writ was served upon the witness at forty minutes past four o'clock, in the afternoon, that, at two o'clock in the afternoon of the same day, and without any knowledge of the suit, the witness telegraphed to the Brantford agent of the company to pay Defendant his claim of $4000, which was done by draft dated the 6th March, and which, it is the " impression " of the witness, was made payable to Defendant; receipt was taken at Brantford, on the 6th, as for a cash payment, the draft was paid on the 8th March by Gillespie, Withall & Co., at Montreal. The fire by which the loss occurred took place in February previous, and the loss had been reported upon and was ordered to be paid. The witness also stated Defendant's domicile to be at Brantford, and that he was not aware of his having any real or personal estate in Lower Canada, except the $4000.

JUDGMENT: " Considérant qu'il y a preuve que, le 5 mars, " 1860, jour de l'émanation du writ en cette cause, et lors de " la signification qui en a été faite aux *tiers-saisis*, il était " encore alors dû par eux au Défendeur une somme de $4000, " et que, par conséquent, les Demandeurs avaient alors le droit " de poursuivre le Défendeur dans ce district, déboute l'exception à la forme et l'exception déclinatoire plaidées par le " Défendeur. (11 *D. T. B. C.*, p. 90.)

ABBOTT and DORMAN, for Plaintiffs.

MACRAE, for Defendant.

CESSION DE BIENS.—RETROCESSION.

BANC DE LA REINE, EN APPEL, Montreal, 7 décembre, 1860.

Présents : Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL, MEREDITH et C. MONDELET, Juges.

HAGAN, Appelant, *et* WRIGHT, Intimé.

Jugé : 1° Qu'un transport fait par un débiteur à des syndics pour le profit de ses créanciers, ayant été depuis résilié à la suite du paiement des dettes, ce débiteur est rentré en pleine possession de tout ce qui pouvait rester des biens par lui transportés, soit en nature, soit *en deniers réalisés ou en créances en provenant ;* et qu'il peut en obtenir le recouvrement en justice, même contre les tiers, sans avoir signifié le jugement de rétrocession, sauf la question des frais sur cette demande. (1)

2° Que, dans l'espèce, le Défendeur qui avait acquis des syndics et redevait une balance, avant contesté entièrement la demande, sans faire aucune offre réelle, doit être condamné aux dépens.

L'Intimé, se trouvant dans l'impossibilité de rencontrer ses engagements, fit, par un acte reçu en mars, 1851, un transport des biens y désignés, à Gilmour, Allan et Alex. Workman, en qualité de syndics, pour le bénéfice de ses créanciers, avec pouvoir de vendre, et l'obligation de remettre au cédant le surplus des biens, aprés les frais d'administration et les dettes acquittées. Le 10 mars, 1854, ces syndics agissant par A. Workman vendirent à l'Appelant un terrain faisant partie des biens de l'Intimé, pour la somme de £175, payable au dit Alex. Workman, ou autres représentants de l'Intimé. (the Respondent's estate.) Toutes les dettes de l'Intimé ayant été acquittées, il poursuivit les syndics pour se faire rétrocéder ce qui restait de ses biens, et obtint un jugement, en la Cour Supérieure, à Montréal, le 27 juin 1857, qui les condamnait à lui en passer un titre, et à lui remettre tout ce qui leur restait en mains comme reliquat ; et la cour ordonnait, en même temps, qu'à faute par les syndics de consentir et exécuter tels actes, le jugement en tiendrait lieu. C'est sous ces circonstances que l'Intimé poursuivit l'Appelant pour recouvrer de lui la somme de £50, balance qu'il redevait sur son acquisition du 10 mars, 1854. A cette demande, l'Appelant plaida d'abord par une défense en droit, et ensuite par une exception, dans laquelle il alléguait qu'il s'était engagé de payer à Alex. Workman, et non à l'Intimé ; que le jugement du 27 juin 1857, n'avait aucun rapport avec son prix de vente, vu que cette créance n'avait jamais été transportée par l'Intimée aux syndics, mais avait été créée par ces derniers, longtemps après le transport par l'Intimé. L'Appelant ne mit pas en cause ses vendeurs, et n'allégua pas non plus le transport de ce qu'il devait, à aucun

(1) V. art. 1571 C. C.

des créanciers de l'Intimé. Le jugement rendu par la Cour de Circuit du district d'Ottawa, sans égard à la défense de l'Appelant, prononça en faveur de l'Intimé, mais ne contient aucun motivé. La Cour du Banc de la Reine a confirmé le jugement de la Cour de Circuit, considérant qu'elle n'avait pas mal jugé. (11 *D. T. B. C.*, p. 92.)

AYLEN, P., pour l'Appelant.

MCCORD, pour l'Intimé.

PROCES PAR JURY.—VERDICT.—PAIEMENT.

COUR SUPÉRIEURE, Québec, 1er octobre 1860.

Présent : TASCHEREAU, Juge.

LA BANQUE DE QUÉBEC *vs.* MAXHAM *et al.*

Jugé : Qu'un verdict prononcé par un jury en matière civile en des termes qui, suivant le langage grammatical, sont ambigus, peut-être interprété par la cour, de manière à lui donner effet, et que, pour cet objet, la cour peut s'aider des lumières que lui offre la preuve, et de l'interprétation que la partie elle-même à donné aux expressions qui sont la cause de l'ambiguité apparente du verdict. (1)

2° Qu'un créancier, en possession de deniers appartenant à un tiers, ne peut les appliquer au paiement d'un billet promissoire auquel le tiers apparaît comme endosseur, si le billet a été retiré par le faiseur au moyen d'un chèque sans valeur. Que le seul recours dans ce cas consiste dans une action spéciale.

TASCHEREAU, Juge : Cette cause m'est soumise 1° par les Demandeurs, sur motion pour jugement en leur faveur, sur le verdict du jury ; 2° Sur application pour jugement contre le Défendeur, Chartré, après inscription et audition finale au mérite sur l'issue avec ce dernier ; 3° Sur une motion par les Défendeurs, Maxham *et al.*, pour jugement en leur faveur sur le verdict du jury. Ce simple exposé démontre que les Demandeurs et les Défendeurs interprêtent le verdict comme leur étant respectivement favorable. Le dossier fait voir que, le 13 septembre 1858, le Défendeur Chartré, fit, avec le commissariat de Sa Majesté, à Québec, un marché par lequel il s'obligeait de fournir, moyennant rémunération, toute la viande de bœuf qui serait nécessaire pour les troupes royales : que Chartré, convaincu que, par ses propres ressources, il ne pouvait rencontrer ses engagements en vertu de ce contrat, s'aboucha avec les deux autres Défendeurs, Maxham et Budden, et leur demanda de l'aide, ce qui fut fait par ces messieurs, qui, le 8 octobre 1858, adressèrent à la banque la lettre suivante : " Quebec, 8th October, 1858. Gentlemen. We have been requested by P. Char-

(1) V. art. 421 et 422 C. P. C.

tré, to ask if the bank would take up his account for the government contract in the supply of beef, and advance him the funds on discounting the paper of A. J. Maxham & Co., he, Chartré, transferring the proceeds of each month's delivery to the bank, or, in other words, the bank only to receive the money. The amount required would not exceed £2000, but, for the fall, in order to secure the supplies for the winter, he would require £4000. That is between this and the 1st of December next. The payments, in all instances have been regularly met, and he at present has paid up every note due that was advanced for said contract for the past year, which expired on the 30th, amounting to £15000 ; waiting your reply this day in the bank, as to whether your will take the whole amount or part, and grant a discount to day of £500. (Signed) A. J. MAXHAM & Co." En conséqnence de cette lettre, la banque, à une assemblée de ses directeurs, tenu le même jour, déclara accéder à cette proposition, à la condition qu'un transport des deniers payables par le commissariat à Chartré serait consenti en faveur de la banque, et qu'une police d'assurance serait effectuée sur le bœuf pendant l'hiver. Le transport fut exécuté le 16 octobre 1858, et accepté par le caissier, Gethings, au nom de la banque, et fut signifié de suite aux officiers du commissariat, mais il n'appert pas que la police d'assurance sur le bœuf ait été prise. On voit que, depuis le mois d'octobre 1858, jusqu'au mois d'octobre 1859, vingt-sept billets de A. J. Maxham & Cie, endossés par Chartré, furent escomptés par la banque, à un montant de $38,538\frac{41}{100}$ dollars, et des checks du commissariat à un montant de $34,152\frac{47}{100}$ dollars, furent reçus à la banque, comme provenant des argents de Pierre Chartré en vertu de son contrat, et furent mis au crédit de Chartré, tel que le constate Gethings, et dont le livre de banque privé de Chartré fait aussi foi. On ne voit pas comment il se fait que ces argents aient ainsi été mis au crédit de Chartré, ou au moins avec le pouvoir d'en disposer comme bon lui semblerait et il me semble qu'en cela il y a eu une déviation du contrat originaire que les Demandeurs doivent expliquer. Il est constaté que le billet dont il est question en cette cause, forme partie des avances faites à Chartré. Les choses se continuent ainsi, Maxham & Cie, signent des billets à l'ordre de Chartré, celui-ci les endosse et les fait escompter à la banque qui en porte le produit au crédit de Chartré, ainsi que les recettes du commissariat, et tout autre argent de Chartré. Il paraîtrait que, dans le cours de cette année, (savoir d'octocre '58, à octobre '59,) il y aurait eu entre Maxham & Cie, et le caissier de la banque, une conversation à l'effet suivant, savoir, que Gethings, s'étant aperçu qu'en plusieurs occasions Chartré était venu à la banque dans un état d'ivresse, il (Gethings) en

avait informé Maxham et lui avait demandé s'il devait continuer à porter au crédit de Chartré, comme d'ordinaire, les argents qu'il recevait pour lui, et que Maxham répondit, oui, et qu'il avait confiance en Chartré, en quelques mots à cet effet et qu'en conséquence, pour retirer les argents, Chartré tirait son check sur la banque, le faisait accepter par cette dernière, et allait le mettre entre les mains de Maxham & Cie, qui le déposait à leur crédit dans la banque, et rachetaient ainsi leurs billets. Telle fut la transaction jusqu'au 4 octobre, 1859, jour auquel Chartré tire un check de $4200 sur la banque, le fait accepter, et au lieu de le mettre en mains de Maxham & Cie., le transporte dans une autre banque, en reçoit la valeur, et laisse Maxham & Cie., à réfléchir sur leur sort. Le même jour, Maxham & Cie., croyant que Chartré leur remettrait le check de $4200, et, sans attendre qu'il leur fût mis en mains, tirent leur propre check pour ce même montant de $4200 pour rencontrer, 1° un billet personnel de $200, 2° quatre billets au montant de $4000 par eux signés dans l'intérêt de Chartré. L'officier de la banque sans s'assurer de l'existence de fonds pour rencontrer ce check, l'approuve, et sur présentation d'icelui à un autre des employés de la banque, les billets sont remis à Maxham & Cie. L'erreur se découvre peu de temps après, et Maxham & Cie., informés des procédés plus qu'extraordinaires de Chartré, se rendent à la banque, et lui adressent une lettre conçue en ces termes: "Québec, 5 October, 1859. To the President and Director of the Quebec Bank, Gentlemen, In consequence of Pierre Chartré having drawn from the bank the proceeds of the money received from the government contract, and appropriating that money to himself, and not to the retirement of our notes amounting to $4500 due yesterday, we beg to state that we are unable for the present to meet them, and request you will retain such sum or sums as he may have to his credit, received by you from the commissariat on account of his indorsations on said paper remaining in your hands. (Signed) A. J. MAXHAM & Co." A cette époque, le 5 octobre 1859, il y avait entre les mains de la banque, au crédit de Chartré, une sommme de 1539\frac{59}{100}$, dont 1530\frac{59}{100}$ provenant des deniers reçus du commissariat. Plus tard, vers la fin d'octobre, 1859, la présente action est instituée par la banque contre les trois Défendeurs pour le recouvrement du billet de $2000, en date du 5 août 1859, signé par A. J. Maxham & Cie, à l'ordre de Chartré, et payable à 2 mois, et le billet est admis être comme tous les autres une suite du contrat auquel j'ai fait allusion. Maxham & Cie, ont divisé leur défense de celle de Chartré; Maxham & Cie, ont plaidé, qu'à l'époque de l'échéance du billet en question, la banque avait en mains une somme de $1500 des argents de

Chartré, reçu par elle du commissariat, et spécialement destinés à rencontrer les billets de A. J. Maxham & Cie, endossés par Chartré en exécution de la convention exprimée en la lettre du 8 octobre 1858, ci-dessus citée, et ratifiée par la banque : qu'il avait offert à la banque la somme de 460\frac{41}{100}$ suivant leur protêt du 10 octobre 1859, pour balance du montant du billet, et concluait par l'offre d'une confession de jugement pour cette somme de 460\frac{41}{100}$, avec intérêt et frais jusqu'au 25 novembre 1859, et que les frais subséquents à ce dernier jour fussent adjugés contre les Demandeurs en cas de refus d'accepter la confession. J'observerai que cette confession est insuffisante et aurait dû être pour $500. L'autre Défendeur a plaidé à l'action par une défense au fond en fait. L'enquête fait ressortir les faits ci-dessus, et le jury auquel l'issue entre la banque et Maxham a été soumise, a rapporté, en réponse anx questions, les déclarations suivantes, savoir, l'existence du contrat ci-dessus récité, les avances faites par la banque à Chartré, sur les billets de A. J. Maxham & Cie, que le billet en question était un de ces billets, que la banque avait reçus du commissariat, pour Chartré, en différents temps, $34,152$\frac{47}{100}$, et enfin qu'à l'époque de l'échéance de ce billet, la banque avait encore en sa possession une somme de 1530\frac{48}{100}$ des deniers de Chartré, *applicable* (textuel) au paiement de ce billet. Il s'élève deux questions : 1° Si le verdict du jury est ambigu, doit-on l'interpréter de manière à lui donner suite, et puis-je pour cela m'aider des lumières que peut m'offrir le témoignage en la cause ; 2° quel est le verdict que le jury a donné, et doit-il recevoir son exécution. Je n'hésite pas à répondre affirmativement à la première question. Pour répondre à la deuxième question, je dois consulter les questions soumises aux jurés, leurs réponses, expliquer ces dernières les unes après les autres, et enfin consulter le témoignage. Cette dernière question dénote assez qu'il y a dans la réponse quatrième du jury, une certaine ambiguité, mais j'ose dire qu'elle n'est qu'apparente, et qu'elle disparaît bientôt en consultant la preuve. Pour en venir à une décision, le jury a dû prendre en considération la lettre de A. J. Maxham & Cie, à la banque, contenant les offres de cautionnement de ces messieurs en faveur de Chartré, et l'engagement final contracté par la banque au moyen duquel elle devait recevoir les argents de Chartrée, pour sa sûreté et celle de Maxham & Cie, et le jury a pu dire en toute vérité que le billet de $2000 a pu être payée au montant de $1530 par une somme égale à ce montant, alors entre ses mains et appartenant à Chartré. Il est vrai que la banque prétend qu'elle n'avait aucun contrôle sur ces deniers, puisqu'ils étaient au crédit de Chartré, qui devait seul en avoir la disposition, mais la banque oublie que, par ses réponses sur faits et articles, et, notamment, par sa

réponse à la cinquième question, elle prétend, en même temps, que ces $1530 devaient être par elle retenus pour faire face aux quatre billets échus le 4 octobre 1859, et que Maxham a retirés par un chèque sans valeur ; et, ne peut-on pas lui dire que, si elle pouvait appliquer ces $1530 au paiement des quatre billets échus le 4 octobre, elle pouvait et avait le même droit de les appliquer au paiement du billet en litige en cette cause. Je suis d'opinion qu'elle le pouvait pour les uns comme pour le dernier billet, malgré l'espèce de contrôle qu'elle avait promis à Chartré d'exercer sur ses deniers, et, dans ce cas, qu'elle est la conséquence de ce droit ? Au paiement de quel billet ces $1530 doivent-ils être appliqués ? On ne peut dire que ce soit aux quatre billets échus le 4 octobre 1859, car ils sont payés quant à ce qui regarde Chartré, attendu qu'il n'y a pas eu de protêt contre lui, et qu'il n'en résulte, contre Maxham & Cie., qu'une action fondée sur ce chèque sans valeur par lui donné pour racheter les quatre billets du 4 octobre. D'ailleurs, une raison qui, dans mon opinion milite très fortement contre le droit de la banque d'imputer ces $1530 au paiement des quatre billets, c'est que la banque n'a pas invoqué ce droit au moyen d'un plaidoyer spécial, et n'a pas plaidé l'existence de ces billets, qui n'apparaissent dans la cause que par hazard, et incidemment, et j'avoue que j'aurais refusé au procès la permission de faire preuve de ces billets sur le principe qu'ils ne furent pas plaidés spécialement. En vain dira-t-on que Maxham & Cie. ont reconnu verbalement et par écrit, que Chartré avait seul le contrôle de ces deniers ; car, à part le fait du livre privé de banque de Chartré sur la tenue duquel Maxham & Cie. n'avaient aucun contrôle, la seule preuve à cet égard est celle donnée par M. le caissier Gethings, et j'avoue que, malgré la haute respectabilité de ce monsieur, la loi m'oblige de déclarer que son témoignage doit être reçu et accepté avec prudence, en raison de la responsabilité qui pèse sur lui en faveur des Demandeurs, par suite de cette déviation apparente du contrat originaire entre les parties. On ne peut invoquer la lettre du 8 octobre 1859, contre Maxham et Cie., parcequ'il faut la prendre en son entier. Maxham & Cie., ont pu, dans l'excitation du moment, écrire cette lettre, mais en même temps ils insistent que la banque retienne la balance entre ses mains pour payer leurs billets échus le 4 octobre 1859. Comme je l'ai dit, le seul billet auquel cela peut s'appliquer est le billet en litige en cette cause, car les autres ne sont pas censés exister ; s'ils existent les questions qui devront surgir sur l'effet légal du paiement de ces quatre billets par un chèque sans valeur, devront être décidées dans une autre action, telle qu'on voit que les Demandeurs ont déjà portée contre Maxham & Cie. Le jury, en déclarant que la somme de $1530 restant entre les

mains de la banque à l'échéance du billet en litige, était applicable au paiement essentielle de ce dernier billet a voulu dire, et a, de fait, dit que ce billet était payé et satisfait d'autant. J'avoue que la phraséologie de la réponse 4me, qui seule est susceptible de doute, n'est pas ce que l'on eût pu attendre d'un jury composé d'hommes de loi, mais, suivant moi, cette réponse est en parfaite unisson avec le langage habituel du commerce, qui, dans le jury en question, se trouvait représenté par douze des citoyens de Québec les plus éclairés et les plus capables de rendre justice aux parties intéressées. J'ajouterai que les Demandeurs, dans leur réponse 5me aux interrogatoires sur faits et articles, font usage du même mot *applicable*, dans le même sens que celui donné par moi au verdict du jury. J'interprète donc le verdict du jury comme clairement énonçant que le billet en question a été acquitté au montant de 1530\frac{48}{100}$, et vu la plaidoirie des Défendeurs limitant ce paiement à $1500, je suis d'opinion que ce verdict doit recevoir son exécution, et que crédit doit être donné aux Défendeurs de cette somme de $1530, et la demande réduite d'autant. Quant au Défendeur Chartré, il n'est pas possible de prononcer contre lui, qui n'est que la caution ostensible de ce billet comme endosseur, une condamnation plus onéreuse que celle qui doit être prononcée contre les débiteurs principaux. En conséquence, je déclare que l'offre de la confession faite par les Défendeurs Maxham & Cie., au montant de 460\frac{41}{100}$, n'est pas suffisantes, et qu'elle aurait dû être de $500, et je maintiens la motion des Demandeurs pour jugement contre les Défendeurs, conjointement et solidairement, pour la somme de $500, avec intérêt du 8 octobre 1859, et les dépens, et deux piastres pour frais de protêt, mais comme les Demandeurs ont nié le paiement des $1530, ils supporteront les frais de l'enquête des Défendeurs, nécessitée pour cette preuve, à être taxés; et je renvoie la motion des Défendeurs, sans frais. (11 *D. T. B. C.*, p. 97.)

STUART et MURPHY, pour la Demanderesse.

LEMOINE, pour Maxham *et al.*

PROCEDURE.—PROCES PAR JURY.—NOVATION.

SUPERIOR COURT, Québec 4 février, 1861.

Before STUART, J., and a Special Jury.

CLARK *et al. vs.* MURPHY *et al.*

Jugé: Que le rapport d'un juré, à l'effet qu'un créancier qui, après avis de la dissolution de la société, par la retraite de l'un des associés, continue les afiaires avec la nouvelle société, et lors de leur insolvabilité, leur donne du délai sans nullement faire mention de l'associé qui s'est retiré de la première société, libère cette société de toute responsabilité, et aussi l'associé qui s'en est ainsi retiré, sera déclaré nul, et jugement sera rendu en faveur des Demandeurs, *nonobstante veredicto*, si la preuve sur laquelle tel rapport a été fait résulte entièrement d'une correspondance écrite, nonobstant qu'elle ait durée pendant deux ans, s'il appert à la cour que par le sens qui doit être donné aux lettres il n'y avait pas d'intention de libérer l'ancienne société. (1)

The case was tried before a special jury, on the 28th May, 1860; the facts of the case were as follows: The Plaintiffs carrying on business at Boston, in the month of December, 1856, sent a consignment of fish to Defendants, who were carrying on business as Commission-Merchants, at Chicago, under the name of Murphy, Noad and Co., for sale, on account of Plaintiffs, at 5 per cent for commission and guarantee. Up to the 13th of March following, Defendants had disposed of a portion of the consignment, to the value of $552, of which $7 were paid in cash; on this day, according to the following letters addressed to Plaintiffs, they dissolved partnership: "Chicago, March, 13th, 1857. Messrs. Clark and Woodward, Dear Sirs, Since our last, we regret we cannot advise much progress in sales of your mackerel. The trade is dull, but several of our dealers will be out of stock in a few day, when something may be done. In consequence of other arrangements our firm is this day dissolved. W. S. Noad assumes the business, and will apprize you of the change. Unless advised to the contrary, the new firm will follow present instructions existing touching the disposal of your property. (signed) MURPHY, NOAD AND CO." "NOTICE. The co-partnership heretofore existing between the undersigned, under the name and style of Murphy, Noad and Co., is this day dissolved by mutual consent. All debts due to or by the firm will be settled by W. S. Noad. Chicago, 13th March, 1857. (Signed) O. MURPHY, W. S. NOAD." "The business heretofore carried on by the late firm of Murphy, Noad & Co., will be continued by the subscriber under the name and style of W. S, Noad and Co., Chicago, 13th March, 1857. (Signed) W. S. NAOD." "CHICAGO,

(1) V. art. 407 et 433 C. P. C. et 1171 C. C.

13th March, 1857. Messrs. Clark and Woodward, Dear Sirs, Referring to the above notices we respectfully solicit a continuation of the favors granted to the late firm, assuring you that no exertions shall be wanting, on our part, in protecting the interests confided to our care, and in giving general satisfaction to our friends. (Signed) W. S. NOAD and Co." Upon which the Plaintiffs replied as follows: "BOSTON, March 23rd, 1857. Messrs. Murphy, Noad & Co., Chicago. Gentlemen, We have your valued favour of 13th instant, also notice of dissolution of copartnership which we regret to hear, but we hope it was for your mutual interest, and we wish you all much prosperity and would be glad to be of service to you. We shall be glad to get account sales of our fish, as soon as possible, as they keep many of our old accounts open, please close up at once if possible. We shall be glad to hear from the new firm with prices of fish, also what can be done with new mackerel, cod fish, &c.. CLARK and WOODWARD."

"Messrs. Clark and Woodward, Dear Sirs, We are in due receipt of your respected favor of 23rd instant. We are doing our very best to close your consignment of fish, and hope soon to wait on you with account sales. Fish is very dull of sale and would not recommend your sending any more before the present lot is disposed of. Good codfish will sell for $4.75, and we have been obliged to have the whole of your Mackerel overhauled, as our merchants would not buy without our guaranteeing them. You may depend on our closing your sales of fish as soon as we possibly can. (Signed) W. S. NOAD and Co." Hereupon followed several letters extending over the summer of 1857, in which Plaintiffs requested W. S. Noad and Co., to close up the old account, and in which W. S. Noad and Co., promised an early remittance, alleging the dullness of the times, &c., as the cause of their delay; and enclosed Plaintiffs an account sales headed as follows: "Account sales fish received, and sold per order and for account of Clark and Woodward, Boston," in which Plaintiffs were credited for net proceeds in the sum of $502.00, and were informed that they, W. S. Noad and Co., had closed business in Chicago, and intended removing to Toronto, and had handed the balance of the consignment to one Hall for disposal. Upon this Plaintiffs write requesting W. S. Noad and Co., to sell the balance of the consignment at Chicago, for what it would bring, in order to get an end of the affair, and remit proceeds. In October and November, W. S. Noad and Co. replied that they were unable to meet their liabilities, or remit the $502.00, amount of account sales, owing to several bad debts, and offered their notes for the amount at 6 and 9 months, with interest, which

Plaintiffs agreed to take. On the 5th of June, 1858, Plaintiffs wrote as follows:

" W. S. NOAD & Co to CLARK & WOODWARDS, Drs.

To net sales Mackerel as per account sales rendered cash 19th June, 1857..		$479 16
Interest on 19th June 1857 to 19th June, 1858	$27 84	
Interest on $239.59 from 18th June to 5th August	2 24	
		30 08
		$509 27
Our draft 3 days sight for	$254 63	
Our draft 60 days sight for	254 64	
		$509 27

" BOSTON, June 5, 1858. W. S. NOAD & Co.—Dear Sirs, We have not heard from you for some time. On November 5, 1857, you stated to us that you wanted 6 and 9 months time on our drafts. We did not get your note as proposed at that time. You will, above, receive memorandum of account; first payment would have fallen due 5th May last; for this we have valued on you at three days sight, and second payment falls due 5th August, for which we have valued on you at 60 days, which please protect. We hope times have improved very much. (Signed) CLARK & WOODWARD." The Plaintiffs not having been paid, in the Month of December, 1859, instituted the present action against Defendants, as composing the old firm of Murphy, Noad & Co., for the sum of $502.00, being the net proceeds of the sales of the consignment up to the dissolution of the firm, on the 13th March, 1857. The Defendant Noad made default, but Murphy, the other Defendant, pleaded, that Plaintiffs had knowledge of the dissolution of the partnership between Defendants, and accepted the new firm of W. S. Noad & Co., as their sole debtor for the liabilities of the old firm, and had released Defendant Murphy, who, from the time of the dissolution of the partnership, had ceased to reside in Chicago, and had been carrying on business on his own account in Quebec. The case came on before STUART, Justice, and a SPECIAL JURY. The question submitted to the Jury was: " Did Plaintiffs release Murphy from his obligation to pay the sum demanded, and accept W. S. Noad & Co as sole debtor of the same ?"

HOLT, for Defendant Murphy, addressed the Jury contending, that, from the above correspondence, it was perfectly manifest that the intention of Plaintiffs was to release Murphy

from the obligations of the old firm, and that they had accepted the new firm as their sole debtor, and had consented to look to the new firm alone for the payment of the debt; that it was not necessary that a release to a partner should be absolutely expressed, it was sufficient if it could be implied from the nature of the correspondence. (1) He maintained that, from the nature of the correspondence no other conclusion could be arrived at, than that it was the intention of Plantiffs to release Murphy; and observed that the circumstance of their having given delay to the new firm, was a significant fact as bearing upon their intention to release Murphy.

ANDREWS, in reply, argued that the question submitted to the jury, was one rather of law than of fact, and ought, therefore, more properly to have been left to the decision of a judge than of a jury. That, where a third person is accepted to pay the debt of another, if such third person does not pay the debt the creditor can fall back upon his original debtor, unless it can be clearly shewn that, in accepting the third person as his debtor, he had also discharged his original debtor; and that, in such case, the intention to discharge the origidal debtor, must be either expressed or clearly implied. (2) That it could not be concluded from the correspondence that Plaintiffs ever intended to discharge Murphy, on the contrary, they had always intended to hold him liable and look to him for payment, if his late partner, the new firm, should fail to do so; that they urged payment of the new firm, because they had been informed that firm was, as agent, to wind up the concerns of the old one; that Plaintiffs had no object in releasing Murphy, seeing that, when he dissolved partnership with Noad, he had pocketed half the proceeds of their goods, and the commission for selling them, and now, when called upon for payment, he turned round and said: " Oh, I am released, because I has dissolved partnership with Noad, and because you have given him delay to pay the amount." That the delay given by Plaintiffs was a strange complaint for Murphy to make, because, at the time that Noad asked for delay, Plaintiffs, instead of granting it could then have sued Murphy and compelled him to pay the amount. That a responsible partner could not step out of a firm and leave consignors and creditors to look to a man of straw.

STUART, Justice, charged the jury, and after going over the proceedings in the cause observed, that the case presented no

(1) Pothier, *Obligations*, p. 292, n° 594; Merlin, *Répertoire*, vbo. *Délégation de dette*, p. 425; Guyot, *Répertoire*, vbo *Délégation de dette*, p. 351; 6 Nouveau Denisart, vbo *Délégation de dette*, p, 139.

(2) Pothier, *Obligations*, n° 600; Pothier, *Contrat de société*, n° 173; Persil, *Sociétés commerciales*, n° 11, p. 84.

complexity, Defendants as partners had received on consignment and sold for Plaintiffs certain merchandise to the amount demanded, and it was intended by that action to compel payment from both Defendants, one of them, Murphy, pleaded that Plaintiffs released him, and accepted Noad as their sole debtor, the only question submitted to the jury was whether Plaintiffs had so released Murphy, and had accepted Noad as their sole debtor of the sum demanded, there was no evidence of any express agreement to discharge Murphy, but it was contended that this release could be fairly inferred from the correspondence. He said that it was fitting to observe that Defendants, upon dissolving their partnership, gave notice of it to Plaintiffs, and, at the same time, informed them that Noad was authorised to collect the debts and liquidate the liabilities of the late firm. After this notice, Plaintiffs addressed their correspondence principally, if not altogether, to Noad. From this circumstance, no inference could fairly attach of any intention to release Murphy, no allusion whatever is made to him in it, the question was a simple one and such as they, commercial men, would have little difficulty in making up their mind upon. The jury, after deliberating about half an hour, returned the following verdict: The jury is of opinion that Plaintiffs released Murphy, and accepted W. S. Noad, by the tenor of their correspondence with W. S. Noad and Co, especially by their letter addressed to the letter after removing to Toronto, and from the fact of their having rendered account current to W. S. Noad and Co., direct, and agreed to accept their notes at long dates, as payment in full, without any reference to Murphy." On the 1st June, Plaintiffs, pursuant to notice, moved that the verdict entered for Owen Murphy, one of Defendants, be set aside, and a judgment given against him, *nonobstante veredicto*, because the verdict was rendered contrary to law, without evidence to support it, and was given upon a question of law not within the cognizance of, or by law determinable by a jury, but a question for the judge, inasmuch as it was one of a pretended contract and agreement between Plaintiffs and Murphy, the proof whereof altogether depended upon the interpretation of written documents, the construction of which, by law, is solely within the province of the judge, and there was in truth no fact to go to the jury; and, because, although the case tried by the jury, as it presented itself at the opening of the trial, was apparently a proper one for their consideration, inasmuch as it was competent to Defendant, Murphy, to have adduced oral testimony of the allegations of his plea, yet it ceased so to be when Defendant closed his case without presenting any other than documentary evidence, and the judge presiding at

the trial should then have withdrawn the question altogether from the jury, and not have allowed them an opportunity of finding in favor of Murphy, in defiance of the evidence given in the cause; and because the verdict as rendered being subversive of the law, the court had then a right to adjudicate upon the evidence in the cause, and reverse the finding of the said jury, and by law ought so to do.

ANDREWS, senior, urged all the grounds set forth in the motion, and argued he was borne out by decisions to the effect that, where the question was one of law, and not one of fact, the case should not have been submitted to the jury, but should have been withdrawn from their consideration and adjudicated upon by the court, that the present case had presented the novel spectacle of counsel turning from the court to address a jury upon a question of law little understood by them. (1) That the construction of written documents is purely matter of law. (2) That the court can set aside verdict and give judgment for opposite party. (3) *Anderson* vs. *Quebec Fire Assurance Company*, verdict for Defendant, judgment upon it reversed and judgment for Plaintiff in appeal; as in *Gibb* vs. *Beacon Insur.*, verdict for Defendant set aside and judgment for Plaintiff.

HOLT, for Murphy, in reply argued that the case was eminently one for a jury; that the intention to release was a matter of fact; that the correspondence furnished the declarations of the parties, which was proper to be weighed by the jury; that no witnesses had been examined because the admissions filed had rendered the examination of witnesses unnecessary, and the case must be looked at in the same way as if witnesses had been actually ezamined.

STUART, Justice: Granted motion and gave judgment against both Defendants, jointly and severally, for amount demanded. (11 *D. T. B. C.*, p. 105.)

ANDREWS and ANDREWS, for Plaintiffs.

HOLT and IRVINE, for Murphy.

(1) 23 Eng. *C. L. Reports*, 273; 37 Eng. *L. and Eq. Repts.*, p. 251; Ib. vol. 14, p. 435; Ib. vol. 30, p. 508.

(2) 1 Starkie, on *Evid.*, p. 525; 1 Taylor, on *Evid.*, p. 50, sec. 36.

(3) 4 *R. J. R. Q.*, p. 74, *Ferguson* vs. *Gilmour*, verdict for Plaintiff set aside and action dismissed.

TESTAMENT.—LEGS.—CONFESSEUR.

COUR SUPÉRIEURE, Québec, 4 mars, 1861.

Présent : TASCHEREAU, Juge.

HARPER *vs.* BILODEAU.

Jugé : 1° Qu'un confesseur peut recevoir un legs de son pénitent.
2° Que toutes restrictions qui ont pu exister à l'égard du confesseur en pareil cas, sous le régime du droit Français, ont été levées par l'acte de la 41ème Geo III, chap. 4. (1)
3° Que le testament, dans l'espèce, n'est pas nul, parce que la testatrice n'aurait pas été saine d'esprit, et parce que ce testament lui aurait été suggéré.

TASCHEREAU, Juge : Le Demandeur, Jean-Baptiste Harper, curé de la paroisse de St. Grégoire, réclame de la Défenderesse la délivrance d'un legs d'une rente annuelle qui lui est accordée par le testament de Marie Louise Langlois, veuve de Louis François Bilodeau, en son vivant, de la Petite-Rivière St. Charles, passé à Trois-Rivières, le 1er Mai, 1846, pardevant Lottinville et confrère, notaires publics. La demande de délivrance de legs est faite à la Défenderesse, comme seule enfant et héritière naturelle de la testatrice. Je dois remarquer que la testatrice fait un legs particulier à la défenderesse de £15 0 0 de rente annuelle et viagère, institue pour légataires universelles ses deux petites filles (Mesdames Falardeau et Rousseau) et confie l'exécution de ses dernières volontés à Valère Guillet, notaire, à Trois-Rivières. La Défenderesse a plaidé. Une défense en droit, alléguant que la Demande en délivrance de legs aurait dû être portée non seulement contre l'héritier légal, mais contre les légataires universels, et contre l'exécuteur testamentaire. Cette défense en droit fut renvoyée, sur le principe que l'action ne mentionant pas de légataires universels ni d'exécuteurs testamentaires, la Cour ne pouvait prendre connaissance que des allégations de la déclaration. Mais la question se trouve soulevée de nouveau à l'audition finale au merite, et cette Cour est appelée à en faire droit. La Défenderesse, par exception péremptoire en droit perpétuelle, a plaidé : 1° Que le Demandeur, longtemps avant l'exécution du testament, lors d'icelui et jusqu'à la mort de la testatrice, avait été le confesseur et directeur spirituel de la testatrice qui demeurait chez lui, et que, comme tel, il ne pouvait légalement recevoir le legs qui lui avait été fait ; 2° Que la testatrice, à l'époque de son testament, était âgée de 78 ans, n'était pas saine de mémoire, jugement et entendement, et, conséquemment, qu'elle était incapable de tester ; 3° Que la testatrice avait été induite en

(1) Statuts Consolid. B. C., ch. 34, sec. 27, p. 321. V. art. 831 et 839 C. C.

erreur et trompée par le Demandeur et autres personnes, et que son testament lui avait été suggéré par le Demandeur dans des vues d'intérêt personnel; qu'elle n'avait pas compris ce testament, et que, par suite d'un complot tramé d'avance, elle avait été engagée à déshériter ses enfants, et que le testament était fait contre ses intentions constatées par cinq testaments et codiciles antérieurs, dans lesquels elle exprimait la volonté de laisser à ses enfants tous les biens lui venant du chef de son mari, comme les siens propres; 4° Que l'actif de la succession se montait à £1560 environ, que le legs du Demandeur, en outre d'un autre legs de £700 qui lui est fait par le même testament, forcerait les légataires universels à vendre à sacrifice les immeubles de la succession; 5° Que ce testament est fait *ab irato*, a été dicté par le Demandeur, et à elle imposé par l'influence que le Demandeur exerçait sur elle; que le testament n'a pas été fait, dicté et lu en présence de deux notaires; 6° La Défenderesse se plaint que le Demandeur ne demande pas son action que la délivrance du legs de £200, et qu'il ne parle pas du leg de £700. Il s'élève en cette cause les questions suivantes de droit et de fait: 1° L'action aurait-elle dû être portée non seulement contre l'héritier légal, mais contre les légataires universels et l'exécuteur testamentaire? 2° Comme confesseur habituel et directeur spirituel de la testatrice, avant le testament, à l'époque d'icelui et jusqu'au décès de la testatrice, le Demandeur est-il disqualifié à recevoir le legs particulier qui lui est fait? 3° La testatrice était-elle saine de mémoire, jugement et entendement, à l'époque de la confection de son testament? 4° Le testament lui a-t-il été suggéré, l'a-t-elle compris; a-t-elle été induite en erreur par suite de quelque complot tramé par la fraude et la cupidité? 5° Ce testament est-il l'effet de la passion et de la vengeance; en un mot, est-il fait *ab irato*? 6° Le testament est-il revêtu des formes légales? 7° Le fait que le Demandeur ne fait demande dans son action que du legs de £200, tandis qu'il a droit à un autre legs de £700, peut-il militer contre son droit d'action? Pour résoudre la première question qui se rapporte au droit du Demandeur d'instituer son action contre l'héritier seul, sans y joindre les légataires universels et l'exécuteur testamentaire, il faut référer d'abord à l'ancien droit coutumier qui nous régit encore à ce sujet, à moins qu'il n'ait été rappelé ou modifié par notre loi statutaire, je veux parler du statut de 1801, qui, de prime abord, semble faire disparaître les droits du sang à l'hérédité, pour la donner à un légataire. Par l'ancien droit, cette demande d'une délivrance de legs, qui ne pouvait se suppléer par aucune formalité, se donnait toujours contre l'héritier du sang, et pour cette bonne raison (et en vertu de la maxime, le mort saisit le vif,) que les héritiers du sang comme saisis de l'hérédité ont

seuls le droit d'examiner le testament et d'en contester les dispositions. Comment peut-on faire cette demande au légataire universel qui lui-même, aussi bien que le légataire particulier, a besoin, pour se mettre en possession de son legs, d'en faire demande à ce même héritier qui est dépouillé de tout, excepté de son titre. On peut ajouter comme motif que rien dans la plaidoirie ne constate que les légataires aient accepté le legs. Le légataire universel ne peut donc délivrer ce dont il, n'est pas saisi, et ce qu'il est lui-même obligé de demander. Quant à l'exécuteur testamentaire, n'étant saisi d'une partie de la succession que pour certains objets, ne les possédant que pour l'héritier et comme son séquestre ou mandataire, on ne peut dire qu'il puisse faire une délivrance qui fortifierait celle que fait l'héritier que la loi saisit de toute la succession, et d'ailleurs le sujet du legs réclamé en cette cause est un immeuble dont l'exécuteur testamentaire n'est pas légalement saisi, et dont il ne peut faire délivrance au légataire. (1) La seconde objection soulevée par la Défenderesse, quant à la capacité du Demandeur de recevoir un legs de celle dont il avait été le confesseur habituel et le directeur spirituel mérite une grande considération. On ne peut douter que, par l'ancien droit français qui régissait ces matières avant le statut de 1801, un confesseur et directeur spirituel, dans des circonstances analogues à celle de la présente cause aurait été déclaré disqualifié à recevoir ce legs, quoiqu'il n'y ait pas de texte spécial de la loi prononçant cette incapacité. On voit que ce n'est que par analogie et parité de raison que les commentateurs du droit français ont appliqué aux confesseurs et autres l'inhabileté de recevoir un legs, qui est prononcée contre les tuteurs et autres administrateurs par l'ordonnance de 1539 de François I. On voit même que, dans certains cas, les juges avaient droit d'admettre les confesseurs à la demande du legs, si le legs était minime, ou si les circonstances faisaient disparaître tout soupçon de suggestion. Mais cette jurisprudence a subi, suivant moi, une modification bien grande par la passation du statut de 1801, la 41e Geo. III, ch. 4. Je considère que ce statut a non seulement étendu les pouvoirs du testateur, mais fait disparaître toutes les disqualifications restrictives à l'égard de toutes les personnes ci-dessus mentionnées comme légataires. Je dois donc dire que le Demandeur n'est pas disqualifié à recevoir ce legs, comme ayant été le confesseur de la testatrice

3° La troisième question relative au fait de savoir si la testatrice était saine de mémoire, jugement et entendement à l'époque de la confection de son testament, ne peut souffrir de difficulté, attendu qu'il est prouvé que cette femme, quoique

(1) V. art. 891, 918 et 919 C. C.

assez âgée, jouissait de toutes ses facultés mentales à cette époque, et était conséquemment très capable de faire son testament.

4° La quatrième question qui est relative à la suggestion du testament n'est pas exempte de difficultés. Il suffit de remarquer que la testatrice laisse ses enfants à Québec pour s'en aller demeurer chez le Demandeur où elle passe plusieurs années de sa vie, y est bien traitée par les nièces du Demandeur, qui lui-même l'appelle sa cousine, sans que l'on sache trop d'où vient la parenté, est la pénitente du Demandeur, fait des dons très généreux à des communautés, et fait un testament par lequel elle lègue au Demandeur £900 sur £1600 qui est l'actif de sa succession, fait d'autres legs au parents du Demandeur, et ne laisse à la Défenderesse, sa fille, qu'un rente viagère de £15, et le résidu à ses petites filles comme légataires universelles. On doit noter que cette dame, de 1828 à 1849, a fait cinq testaments et codiciles, y compris celui dont il est question, et que par tous ceux qui précèdent le dernier elle n'avait pas oublié sa fille et ses petits-enfants, et que ce n'est qu'en 1849 qu'elle a changé ses intentions, prouvées d'abord par ses testaments et par les aveux qu'elle fit à diverses personnes. D'un autre côté dans tous les testaments antérieurs, la Défenderesse n'a toujours eu qu'un minime legs de £12. On doit noter aussi que la testatrice se rend pour faire son testament chez un notaire qui était l'ami intime du Demandeur, et chez lequel le Demandeur allait souvent quand il allait à Trois-Rivières. Le Demandeur admet lui-même qu'il avait une grand influence sur la testatrice, et qu'il eut pu lui suggérer son testament s'il l'eut voulu, mais qu'il n'a jamais voulu l'entendre lui parler de son testament. Toutes ces circonstances pourront bien laisser dans mon esprit quelque doute sur la probabilité d'une suggestion d'un testament, mais d'un autre côté il n'y a rien de prouvé contre la conduite du Demandeur ; au contraire, il semble, dans toutes les occasions, avoir évité de parler avec la testatrice de son testament. Tous les témoins s'accordent à considérer le Demandeur comme un homme très pieux et très désintéressé, et la testatrice est prouvée, au-delà de tout doute, avoir conservé jusqu'à sa mort un jugement des plus sains, une volonté des plus fermes, et une défiance assez prononcée. Quel motif a pu engager la testatrice à dépouiller ainsi ses enfants pour l'avantage d'un étranger ? Question difficile à résoudre, et que la testatrice seule possédant son entier jugement a pu apprécier. Elle avait par la loi le pouvoir de tester comme elle l'a fait et elle tenait d'elle seule la volonté de déshériter ses enfants. Il ne m'appartient pas de scruter ses motifs les plus intimes, lorsque la preuve faite devant moi ne me convainc pas qu'on ait fait à son égard usage d'une influence étrangère et mal-

honnête pour lui dicter ses dernières volontés. Il y a plus, le Demandeur produit, après la mort de la testatrice, une lettre de cette dernière, écrite et signée par elle, par laquelle elle retranche quelque chose du legs du Demandeur, en le chargeant de payer des legs assez considérables envers d'autres personnes. Cette lettre, bien écrite, dénote chez la testatrice une volonté bien arrêtée de donner effet à son testament, et porte la date du 28 mai 1850, (quinze mois après son testament), et la production de cette lettre par le Demandeur qui pouvait la supprimer, dénote chez lui ce caractère de désintéressement que lui donne les témoins, car, en la supprimant, il s'exemptait, au moins suivant la loi, de payer près de quatre-vingt louis courant en legs.

5° La cinquième question, savoir si ce testament est fait *ab irato*, ne peut nous détenir longtemps. Indépendamment de la question de droit qui s'élève sur l'effet qu'aurait sur les dispositions de ce testament la preuve qu'il avait été fait *ab irato*, je dois dire qu'il n'y nul preuve d'aucun sentiment de haine ou de vengeance de la part de la testatrice contre ses héritiers, tout ce que l'on peut dire pour justifier ces dispositions, c'est que la testatrice, femme très pieuse, voulait faire, et a fait, des legs pieux, qu'elle recommande dans sa lettre du 28 mai 1850, au Demandeur, d'employer son legs à des œuvres pies; et de plus, que la testatrice a pu se faire illusion sur la valeur de ses biens; mais ce qui montre qu'il n'y a pas eu haine de sa part, c'est qu'elle donne à sa fille, la Défendresse, une somme de £15, plus considérable que celle qu'elle lui donnait par ses premiers testaments, et qu'elle institue ses petites filles légataires universelles. Le testament est revêtu de toutes les formalités nécessaires et requises par la loi, et le fait que le Demandeur ne fait demande que de son legs de £200, tandis qu'il pourrait faire demande en même temps de celui de £700, ne peut militer contre lui. Ce n'est pas un sujet de plainte que la Défenderesse puisse proférer; ce sera sur une autre action que la Défenderesse aurait droit de se plaindre ainsi, si toutefois le Demandeur juge à propos de le réclamer. Pour toutes ces raisons je suis clairement d'opinion que le Demandeur a le droit de son côté; qu'il n'a rien fait pour le disqualifier à prétendre à la délivrance de son legs; et j'ordonne en conséquence qu'il lui soit fait délivrance de son legs à toutes fins que de droit, mais sans dépens contre la Défenderesse. Le jugement de la cour ordonne, en conséquence, *délivrance de legs*. (11 *D. T. B. C.*, p. 119.)

DELAGRAVE, pour le Demandeur.

TESSIER, pour le Défendeur.

OBLIGATION.—INTERET.—USURE.

COUR SUPÉRIEURE. Québec, 4 février 1861.

Présent : STUART, Juge.

BELLEAU *vs.* DEGOURDELLE.

Jugé : Que dans une action sur une obligation, le Demandeur ne peut, dans l'espèce, recouvrer que le montant réellement perçu par le Défendeur, et non le montant porté à l'obligation. (1)

La présente action fut instituée le premier jour de septembre 1859, pour la somme de cent trois louis dix chelins. Le Demandeur réclamait, en premier lieu, cent louis, montant d'un d'un acte d'obligation portant hypothèque, fait et passé devant Petitclerc et confrère, notaires, en date du 27 août, 1857, par lequel le Défendeur reconnut devoir au Demandeur la susdite somme, pour valeur reçue, par pareille somme prêtée au Défendeur, en présence des notaires ; et, aussi, une somme de trois louis, dix chelins, pour certains frais d'opposition fondée sur la dite obligation. Le Défendeur plaida en substance : 1° Que la somme de cent livres mentionnée en la dite obligation, n'avait jamais été prêtée par le Demandeur au Défendeur, et que le Demandeur n'avait compté au Défendeur que celle de soixante et trois livres courant ; 2° que la différence entre la somme reçue et le montant de l'obligation avait été retenue par le Demandeur sous forme de *bonus*. Le Défendeur maintint que, par la loi en force, lors de la passassion de l'acte d'obligation, (2) le Demandeur ne pouvait pas stipuler un taux d'intérêt excédent six pour cent par an, et que tous contrats, stipulant un excédant six pour cent par an, étaient nuls, et que, partant, l'obligation du 27 août était nulle et de nul effet. Toute la preuve consiste des réponses du Demandeur aux interrogatoires à lui soumis par le Défendeur, et de cette preuve il résulte : Que le Demandeur n'avait reçu ni *bonus* ni escompte du Défendeur pour le prêt en question en la cause ; que, vers le commencement d'août 1857, le Défendeur était allé chez le Demandeur, afin de faire l'emprunt d'une somme d'argent ; que le Demandeur dit au Défendeur qu'il n'avait pas d'argent à prêter, et référa le Défendeur à certaines personnes dans l'habitude d'en prêter ; que, dans le cours de la conversation, il fut question de certaines personnes qui prêtaient en donnant des débentures. Il fut *expliqué au Défendeur qu'il serait obligé de faire des sacrifices s'il empruntait sur cette espèce de sûreté ;* que quelques jours après,

(1) V. *S. R. C.* de 1886, ch. 127, s. 10 et 11.

(2) 16 Vict. ch , sec. 3.

dans le même mois, le Défendeur revint de nouveau chez le Demandeur, et dit qu'il trouvait à échanger une débenture de cent louis pour soixante et quinze louis, dans un bureau, disait-il, vis-à-vis la Cour de Justice, et demanda si le Demandeur était disposé de lui en laisser avoir une de cent louis ; que le Demandeur lui dit alors qu'il *préférait ne pas lui en donner parce que la perte serait trop forte pour lui.* Il répondit qu'il lui fallait cet argent pour un achat qu'il avait fait, et sur lequel il était en chemin de faire un gros profit par une vente ; que le Demandeur consentit alors à la demande du Défendeur de lui donner une débenture de cent livres payable au porteur, avec intérêt à six pour cent payable semi-annuellement ; qu'après avoir réglé les délais et les sûretés offertes, l'obligation mentionnée en cette cause fut exécutée ; que de retour au bureau du Demandeur, le Défendeur reçut la débenture, et se préparait à laisser le bureau lorsqu'il dit au Demandeur que cela lui éviterait des troubles et lui ferait plaisir, s'il lui payait sur cette débenture les trois cents piastres qu'il disait lui être offertes comme ci-dessus ; que le demandeur n'ayant aucune raison de soupçonner les motifs d'action du Défendeur, remit au Défendeur trois cents piastres ; que le Défendeur, de son bon gré, sans *aucune demande de la part du Demandeur*, lui paya douze louis pour deux années d'intérêt à écheoir, le Défendeur alléguant que ça pouvait lui être plus facile alors que plus tard. Le Défendeur fit un *affidavit* au soutien d'une motion pour interrogatoires supplémentaires dans lequel il nia formellement qu'il avait été question de débentures entre lui et le Demandeur. De plus, il déclara qu'il n'avait jamais consenti à accepter une débenture, qu'il n'avait jamais reçu une telle débenture de la part du Demandeur, et qu'il n'avait conséquemment jamais remis une débenture au Demandeur en considération de la somme de soixante et quinze louis. Il admit avoir payé ou remis au Demandeur une somme de douze louis, qu'il prétendit être pour intérêt sur le montant de l'obligation. Le Demandeur, interrogé de nouveau, répondit que la débenture en question portait le numéro cent quatre-vingt-douze, et la date du onze décembre 1855 ; qu'il l'avait acquise dans le mois de mars 1857, pour la somme de quatre-vingts louis. De la part du Demandeur, il fut dit que le contrat était parfaitement légal ; que c'était un contrat bien connu, surtout depuis l'émission de débentures par le gouvernement pour venir en aide aux incendiés de 1845 ; que la valeur de ces débentures variait d'un jour à l'autre, et qu'il eut pu se faire que si le Défendeur n'eut pas disposé sitôt de la débenture qu'il avait reçue du Demandeur, elle eût pu plus tard monter au pair, ou même se vendre à prime ; c'était un contrat aléatoire ; en supposant que

le Défendeur, après avoir gardé la débenture pendant un certain temps en eut disposé à un étranger pour une somme quelconque, lui eut-il été loisible de dire au Demandeur dans une action pour le recouvrement du montant de son obligation : J'ai vendu cette débenture pour £75, et vous n'avez pas droit de recouvrer de moi plus que je n'ai reçu moi-même. Assurément non. Une pareille pretention n'eut pu être accueillie. Eh bien, le fait qu'il avait vendu cette même débenture au Demandeur ne saurait changer leur position ; il importait peu au reste que le Défendeur fut resté propriétaire de la débenture une heure ou un an. Si cette débenture était restée en sa possession comme propriétaire, ou s'il pouvait en disposer comme bon lui semblait en la transportant au Demandeur ou à tout autre, assurément que le Demandeur avait bien le droit comme toute autre personne d'en devenir l'acquéreur.

STUART, Justice : This action is for the recovery of a sum of $400, amount of Defendant's obligation bearing date the 27th August, 1857, which, upon its face, purports to be for a like sum lent by Plaintiff to Defendant. To this action Defendant pleads that the sum lent was $252, and no more ; that the difference between that and the sum demanded was intended as a *bonus* for the loan ; that Plaintiff cannot recover more than the sum lent and six per cent interest ; and that the obligation or security sued upon was void for the difference. The issue, therefore, between the parties is whether the loan was such as set up by Plaintiff, or such as alleged by Defendant, but neither pretends that the contract between them was other than a loan. The Plaintiff being examined on *faits et articles* by Defendant, relates minutely the circumstances which led to the passing of the obligation sued upon ; and, though the transaction might be looked upon as the sale of a turnpike trust debenture ; yet, as the parties throughout the case treat the contract as one of loan, the court feels itself bound to deal with it as it is set up by both parties. The Plaintiff says that he gave $300, from which the Defendant, unsolicited, paid him $48 for two years interest to arise on $400, thus leaving a sum of $252, as the one the Defendant took away with him. The law makes the contract, and any security for the same, void so far as relates to any excess of interest over and above the rate of six dollars for the forbearance of $100 for a year. In Montreal, the case has arisen, (1) and the court there reduced the security to the sum received by the Defendant. The court must do likewise in the present case, and in some others before it ; and there must be judgment

(1) *Moisan* vs. *David*, 4 L. C. Jur., p. 302.

against the Defendant for $252, with interest from the date of the obligation. (11 *D. T. B. C.*, p. 166.)

BELLEAU et JOLICŒUR, pour le Demandeur.

FOURNIER et GLEASON, pour le Défendeur.

ASSURANCE.—EVALUATION DES DOMMAGES.

QUEEN'S BENCH, IN APPEAL, Québec, 12 mars 1861.

Before Sir L. H. LAFONTAINE, Chief-Justice, AYLWIN, DUVAL MEREDITH and MONDELET, Justices.

THE EQUITABLE FIRE INSURANCE COMPANY, Appellants, *and* QUINN, Respondent.

Jugé: Qu'un assuré a droit de recouvrer d'une compagnie d'assurance qui a assuré son fonds de commerce la valeur de tel fonds sur les marchés lors de sa destruction par le feu, et non seulement le prix coûtant d'icelui, ou la somme que la confection des effets peut avoir coûté à l'assuré, nonobstant que les profits sur l'objet assuré n'avaient pas été assurés. (1)

Respondent, Plaintiff in the court below, obtained judgment against Appellants for the sum of £200, being the amount insured by them on his stock and utensils in trade as a general turner. The principal matters of fact in Plaintiff's declaration were admitted, including the making of the policy, the amount insured thereby, the renewal thereof, and a loss by fire while the policy was in force; but not admitting the quantity and value of the articles insured by the policy. The quantity and value were, however, established by Respondent's witnesses. By the policy, Appellants agreed to *pay* or *make good to the insured* all such loss or *damage as the said insured should suffer by fire.* The loss and damage which he had suffered, Respondent contended, was the *value* of the blocks in the market. The Appellants, on the contrary, contended that they were only liable to Respondent for the cost of the effects, inasmuch as Respondent had not effected insurance upon the profits he expected to make upon his goods. A number of witnesses were produced by Appellants who established the cost of the articles insured at a considerably lower amount than the value proved by Respondent. The Appellants, in consequence, tendered the sum of one hundred pounds, with interest and costs, to the party insured, who refused to accept the offer, and the present appeal was in consequence instituted.

MEREDITH, Justice: The action in the court below was founded upon a policy of insurance by which Plaintiff, a

(1) V. art. 2575 et 2582 C. C.

block-maker by trade, insured his stock in trade, consisting of blocks, for £200. The property insured having been destroyed by fire, the present action was brought for the recovery of the insurance; and the only question between the parties is as to the value of the blocks destroyed. The Defendants contend that Plaintiff is not entitled to more than the amount which it cost Plaintiff to manufacture the blocks in question; but this pretension cannot, I think, be mantained. The Plaintiff is entitled to what the blocks were worth in the market, at the time they were burned; and I think, according to the evidence they were worth the amount Plaintiff had insured upon them, namely, £200; that being the amount of the judgment in favour of Plaintiff. And therefore that judgment ought to be confirmed.

DUVAL: The judgment of the court below should, in my opinion, be confirmed, inasmuch as both the english and french law, on this point, declare that the amount covered by the insurance is the actual loss, without any reference to the cost price; and this is what the court now grants.

The judgment of the Court below was therefore conformed. (11 *D. T. B. C.*, p. 170.)

LELIEVRE, for Appellants.

STUART and MURPHY, for Respondent.

PROCEDURE.—CONTESTATION DE COLLOCATION.—DEPENS.

SUPERIOR COURT, Québec, 4 Avril, 1861.

Before STUART, Justice.

ADAMS, Plaintiff, *vs.* HUNTER, Defendant, *and* EVANS and McKENZIE, Opposants.

Jugé: Qu'une partie colloquée par erreur, *ultra petita*, doit payer les frais de contestation de telle collocation, quoiqu'en la recevant, il eut donné immédiatement avis qu'il y acquiescait, avec un consentement que jugement fut rendu suivant les conclusions de telle contestation, mais sans frais contre lui. (1)

Julia Evans, by her opposition, prayed to be collocated and to rank upon the proceeds of one of the lots of land sold in the cause from the 2nd December, 1856, and upon the other from the 9th December, 1857. McKenzie claimed to rank on the 2nd lot from the 14th January, 1857. The prothonotary, in his report, by error, collocated Evans on both lots from the date of her first mortgage, thus giving her a preference which she had not asked on the second lot over

(1) V. art. 478 et 748 C. P. C.

McKenzie. This report was filed the 21st March, 1861, and, being a Thursday, the delay to contest the report expired on the 2nd April. On the 28th March, McKenzie contested the collocation of Evans, and, the same day, served upon her a copy of centestation and notice of inscription for 2nd April, for hearing on the merits thereof. Evans on the same day gave notice of her acquiescing in that contestation, and of her consent that judgment should be entered maintaining the same, but without costs against her. On 2nd April, persuant to notice, Evans moved and obtained *acte* of her declaration that the collocation in her favor was an error of the prothonotary, and that she consented to the amendment of the report but without costs against her.

VANNOVOUS, for McKenzie, argued that he had been put to costs, and that Evans should be held to pay them, inasmuch as they must be paid either by her or by the prothonotary; that Evans should pay them because she had seen herself ranking before McKenzie in the report, by which position she would have benefited, and did not intimate her willingness that McKenzie should have his right position; that it is the duty of all Opposants to ascertain whether they accept a correct place in the report, and if they do not thereby injure another, they should not compel another party to incur the costs of a contestation, they should be held to pay such costs.

ANDREWS, senr., contended that costs were a penalty upon the *téméraire plaideur*, that is a party who asks that to which he is not entitled; that Evans, asked nothing but that to which she had a right, but by an oversight of the officer of the Court she had not been ranked according to her demand, and that, for such error, she should not be made accountable, she having so soon as notified of the mistake consented to its correction; that the Prothonotary drawing up a report was equally the agent of all the Opposants, and that Evans should no more be liable for his mistake than any other of the parties in the cause; that an Opposant could not be expected to examine every claim to ascertain whether the officer to whom had been confided the duty of so doing had rightly placed him upon the report, all that could be expected was that each party in his own interest should see within the delay allowed for contestation that his own rights had not been mistaken or overlooked, that Evans was not in fault, and should not therefore be condemned in costs for the error of the officer of the Court, for whose acts she was no more the *garant* than was McKenzie.

STUART, Justice: It is a hard case for Evans, there is however no instance in which, under circumstances like the present, the prothonotary has been held to pay costs, these costs

have been incurred by McKenzie and he is entitled to a judgment for them. The contestation is therefore, maintained with costs against Julia Evans. (11 *D. T. B. C.*, p. 172.)

VANNOVOUS, for McKenzie.

LEMOINE, for Julia Evans.

LOUAGE.—SOUS-LOCATION.—DOMMAGES.

CIRCUIT COURT, Quebec, 22nd APRIL, 1861.

Before TASCHEREAU, Justice.

THÉBERGE *vs.* HUNT et al.

Jugé : Que lorsqu'un locataire est poursuivi par son sous-locataire, pour dommages résultant de ce que les lieux loués ne sont pas clos et couverts, le locataire a droit d'action en garantie contre le locateur, quoiqu'il y ait clause dans le bail entr'eux que le locataire ne sous-louera pas sans le consentement du locateur, et quoique le locataire ait fait sous-bail sans tel consentement, le locateur cependant, plus tard, recevant de lui l'extra premium d'assurance résultant de tel sous-bail, le sous-locataire étant un aubergiste. (1)

On the 15th January, 1859, the heirs Hunt, by Weston Hunt, one of them, acting for himself and as agent for the others, leased the premises in question to Plaintiff *en garantie*, André Théberge, the lease containing the clause : " that the " lessee shall not sublet without the consent of the lessors." On the previous day, the 14th January, 1859, Théberge had sublet to Marc Lapointe. In February 1861, Lapointe brought suit against Théberge, to recover damages caused him in consequence of the house not being *close et couverte*, and Théberge instituted his action *en garantie* against the heirs Hunt. To this action Defendants *en garantie* pleaded a general denegation. Théberge examined Weston Hunt, one of Defendants *en garantie*, who admitted that he was aware the house had been sublet to Lapointe, and that, in consequence, he had exacted and received from Théberge the additional premium of insurance which had become due on account of the premises being sublet to a tavern-keeper.

ANDREWS, Senior for Théberge, argued that the action *en garantie* always lies, whether the *trouble* was caused to the lessee or to his sub-tenant, (2) and generally against the party whose default is the cause of the action against the Plaintiff *en garantie*, because, in such case, the Defendant in chief cannot properly defend himself without putting that party

(1) V. art. 1612 et 1638 C. C.

(2) Guyot, *Rép. de Jurisp.*, vbo. *Bail*, p. 43 et seq.

in the cause, and because it is his interest to be in the cause, and a circuit of actions is avoided. (1) If Hunt's action in chief had been to dispossess the sub-tenant, because of the want of right in the principal lessor to lease the premises the action *en garantie* would lie as it would also if the sub-tenant had not been able to obtain possession by reason of the fault of the principal Defendant. That Théberge not having the right to sublet did not alter the case, because the damage still originated in the default of Hunt, and Théberge having contravened the stipulation not to sublet merely gave Hunt an action to resiliate the lease and to recover any damages occasioned by such contravention. (2) But, in fact, Hunt had not even the right to resiliate the lease, because he had, if not formally, at least tacitly, consented to the subletting after it had taken place by receiving an extra premium of insurance.(3)

PARKIN, for Hunt, argued there was no consent given in writing by Defendants *en garantie*, as there should have been to be of any use to Plaintiff *en garantie*, and to destroy a clause in the written lease; that there was ne contract between the parties, Plaintiff and Defendants *en garantie*, and there could be no *garantie simple* where the contracts were separate, that there was no *lien de droit* between the parties, therefore, the one was not liable to the other *en garantie simple*.

ANDREWS, in reply, said there was always a *lien de droit* between a party wrongfully causing an injury towards the party injured. The right of a lessee was like that of a vendee in respect of an action *en garantie*.

TASCHEREAU, Justice, gave Judgment in favor of Plaintiff *en garantie*, stating that, under the circumstances of the case, the action was well founded. (11 *D. T. B. C.*, p. 179.)

ANDREWS and ANDREWS, for Théberge.

ANDERSON and PARKIN, for Hunt *et al.*

(1) 7 *R. J. R. Q.*, p. 459, *Delvechio* vs. *Joseph*.

(2) Marcadé, vol. 6, p. 441.

(3) Marcadé, *ubi supra*.

BILLETS PROMISSOIRES.—ENDOSSEUR.

BANC DE LA REINE, EN APPEL, Montréal, 1 juin, 1861.

Présents : Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL, MEREDITH et MONDELET, Juges.

DAY, Appelant, *et* SCULTHORPE, Intimé.

Jugé : 1° Que l'ordre des endossements sur un billet n'est qu'une présomption des engagements successifs des endosseurs les uns à l'égard des autres, et que cette présomption peut être écartée par la preuve d'un entendement ou convention contraire.

2° Que, dans l'espèce, l'endossement inscrit par un des endosseurs avec la condition expresse que cet endossement serait précédé par l'endossement d'un tiers, qui a su, par le porteur du billet, la condition de cet endossement, ne peut donner à ce tiers un droit d'action contre tel endosseur, le porteur du billet (qui était le signataire même) devant être considéré, dans ce cas, comme le mandataire de cet endosseur. (1)

L'Action était portée contre l'Appelant par l'Intimé, pour le recouvrement d'un billet que ce dernier alléguait avoir été fait le 20 août, 1859, pour $1000, par les nommés W. Smith & Co., payable à leur propre ordre, et par eux endossé et remis à l'Appelant, qui l'aurait à son tour endossé en faveur de l'Intimé, à qui il l'avait remis. La défense de l'Appelant était qu'il n'avait endossé le billet que comme accommodement, et avec l'entendement que l'Intimé placerait son nom au-dessus de celui de l'Appelant comme second endosseur, et serait tenu au paiement du billet avant l'Appelant, et que l'Intimé avait connaissance de cette convention en recevant le billet des mains de Smith & Co., qui alors, agissaient comme les mandataires de l'Appelant, et que, dans ces circonstances, l'Intimé n'avait aucun recours contre l'Appelant, nonobstant qu'il eût, contrairement à la convention, mis son endossement après celui de l'Appelant. L'Intimé, interrogé sur faits et articles, admit que Smith, un des signataires du billet, lui dit, en lui faisant endosser le billet, que l'Appelant voulait avoir la signature de l'Intimé au dessus de la sienne ; et il fut également prouvé, par ce même Smith, qui fut interrogé comme témoin que, pour obtenir un endossement de l'Appelant sur un billet, il lui avait avait exhibé un billet antérieur, sur le dos duquel l'Intimé avait d'abord inscrit son nom après celui de l'Appelant, puis l'avait rayé après l'échéance, et inscrit au-dessus de celui de l'Appelant. La Cour Supérieure a maintenu l'action par jugement rendu le 29 février, 1860 : " The Court, considering that the signature and endorsement of Defendant on the promissory note, is proved, and that such endorsement is unrestricted and unconditional, and precedes that of plaintiff ; considering that

(1) V. S. du C. de 1890, ch. 33, sect. 55.

it appears from the evidence that Plaintiff hath paid and satisfied the note as indorser thereon, subsequent to Defendant; considering that the promissory note was delivered to Plaintiff to be endorsed by Defendant by the maker thereof, and that the condition upon which the note was endorsed and delivered by the maker thereof, to wit, that he, Plaintiff, should write and sign his name thereon as indorser over and above the name of Defendant, was not made known to Plaintiff as a condition of Defendant's indorsement, at the time of the delivery to him of the note, and, moreover, that it does not appear that any condition was exacted by Wm. Smith, the maker of the note, and the agent of Defendant in that behalf, at the time of the delivering of the note to Plaintiff for his indorsement, and considering, further, that Plaintiff did not agree to any special condition, or receive, indorse and negotiate the promissory note upon the condition alleged in Defendant's plea; considering, further, that there is nothing in the evidence of record to defeat or impair, in law, Plaintiff's recourse against Defendant, as waged by the present action, and that Defendant has failed to establish his plea, doth dismiss said plea, and doth condemn Defendant to pay and satisfy to Plaintiff the sum of $1000, &c." Ce jugement, a été infirmé pour les motifs qui suivent: " La cour, 1° considérant que l'action du Demandeur Intimé avait pour objet de faire condamner le Défendeur Appelant à lui payer le montant d'un billet de $1000, que William Smith faisant ci-devant commerce à Montréal sous la raison de William Smith & Co., avait le 22 août 1859, souscrit à son propre ordre, et qui est allégué, dans la déclaration, avoir été endossé d'abord par Smith, à l'ordre du Défendeur, puis par ce dernier à l'ordre du Demandeur, et que le jugement dont est appel a donné gain de cause au Demandeur; 2° considérant que, le Défendeur a prétendu qu'il n'avait endossé et remis le billet ainsi endossé, non au Demandeur, mais à Smith lui-même, qu'avec l'entendement et sous l'expresse condition que le Demandeur serait le premier endosseur, et écrirait son nom comme tel entre le nom de Smith et celui du Défendeur, afin que celui-ci eût le Demandeur pour garant du paiement du billet, au cas de non paiement d'icelui à son échéance par Smith; qu'ensuite Smith délivra le billet au Demandeur pour en obtenir son endossement, avec le même entendement et sous la même condition, à lui expressément déclarée dans cette occasion; que le Demandeur, lorsque Smith lui remit le billet, connaissait que l'autorité que Smith avait de faire usage du nom du Défendeur comme endosseur était restreinte par l'entendement et la condition ci-dessus, et qu'il ne devrait avoir aucun recours contre le Défendeur; que, dans ces circonstances, le Demandeur

n'avait pas d'action contre lui; 3° considérant que la preuve faite dans la cause, et les réponses mêmes du Demandeur sur faits et articles, ont pleinement établi les allégués de l'exception; qu'il est en outre prouvé que Smith et le Demandeur ont, en cette occasion, agi de supercherie envers le Défendeur, et se sont entendus et concertés entre eux pour tromper sa bonne foi; 4° considérant que, dans ces circonstances, le Demandeur était non recevable dans son action, et que, par conséquent, dans le jugement dont est appel, il y a mal jugé: Infirme le jugement et déboute le Demandeur Intimé de son action. (11 *D. T. B. C.*, p. 269.)

CASSIDY, pour l'Appelant,

BETHUNE et DUNKIN, pour l'Intimé.

TEMOIN.—TAXE.—TUTEUR.

CIRCUIT COURT, Montreal, 30th April, 1861.

Before SMITH, Justice.

DAGENAIS *vs.* GAUTHIER.

Jugé: Qu'un témoin, sommé pour rendre témoignage dans une cause dans laquelle le Défendeur était partie, en sa qualité de tuteur à une substitution, ne peut recouvrer le montant de sa taxe dans une action portée contre le tuteur personnellement. (1)

Plaintiff sued to recover the amount of his tax, for attendance as witness for Plaintiff, in a case of *Gauthier, ès-qua.*, vs. *Boudreau*, formerly pending in the Superior Court, Montreal. The plea was to the effect that Defendant was not liable *personally* towards Defendant, inasmuch as the suit in which the now Plaintiff was summoned as witness, was not brought by the now Defendant, personally but in his quality of tutor to the substitution created by the will of one Simard, in which quality it was contended he should be sued. The court sustained the plea and dismissed the Plaintiff's action. (11 *D. T. B. C.*, p. 281.)

BETOURNAY. for Plaintiff.

LEBLANC and CASSIDY, for Defendant.

(1) V. art. 280 et281 C. P. C.

PROCEDURE.—ENQUETE.—DEPENS.—SAISIE-REVENDICATION.

QUEEN'S BENCH, APPEL SIDE, Montreal, 1st June, 1861.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

HEARLE, Appellant, *and* DATE, Respondent.

Jugé : Que lorsqu'il est demandé à une partie par interrogatoire sur faits et articles s'il n'a pas reçu les originaux de certaines lettres, à lui adressées par la partie adverse dans la cause, il est irrégulier de produire d'autres lettres dont il n'est pas question.

Que, lorsque des effets sont saisis-revendiqués sur les lieux ci-devant occupés par le Demandeur et le Défendeur comme associés, et que nulle preuve n'est faite d'une demande ou d'un refus de les livrer, et que les effets sont remis au Demandeur en vertu d'un jugement interlocutoire de la Cour, le Défendeur alléguant par son plaidoyer qu'il n'a jamais réclamé les effets, et demandant acte de ce qu'il est prêt d'en faire la livraison, l'action du Demandeur sera renvoyée avec dépens, en autant qu'il appert que la saisie a été faite sans nécessité. (1)

This was an action *en revendication* brought by Appellant, against Respondent, to recover certain moveables. The declaration set up that the effects claimed came into the possession of Respondent after the 20th of January, 1860, and that he refused to restore the same to Appellant ; the Defendant pleaded that he had no interest in the articles claimed by Appellant, and had never claimed the same or refused to deliver them to Respondent, that the store had been leased to the partnership of Hearle and Date, (composed of Appellant and Respondent) who carried on business under articles of co-partnership dated 22nd August, 1853, passed before notaries ; that, on the 19th January, 1860, Appellant of his own accord, dissolved the co-partnership, and that the articles seized had for a long time been in the shop, without any claim of property whatever on the part of Respondent, who never objected that they should be taken away by Appellant, and formally consented that they and each of them, should be removed by Appellant at his costs and charges. By the conclusions he prayed *acte* of his declaration and offer, and concluded that Appellant be condemned to pay all the costs of the action. The Appellant in his answer prayed *acte* of the Respondent's declaration that he did not claim the effects, and also prayed for a condemnation against Respondent for costs. On the 22nd March, 1860, Respondent, on affidavit, moved for *acte* of the declaration by him then and therefore made, that he consented to the removal of the effects seized, and that Appellant be held to removed the same within a delay to be

(1) V. art. 478 et 866 C. P. C.

fixed by the Court; and, on the 23rd, Appellant moved praying for *acte* of this declaration, and that the sheriff be ordered to deliver the effects seized to him. The latter motion was granted, and by judgment rendered on the 23rd of March, the sheriff was ordered to deliver the property seized to Appellant. At the hearing on the merits Respondent moved to reject certain paper which Appellant had produced with his answers to the interrogatories submitted to him, on the ground that they had not been inquired of, and were illegally and irregularly filed. The Appellant was asked whether whether certain letters, copies of which were filed, had been sent to him by, and received from Respondent. Other letters sent to Appellant and Appellant's answers thereto were produced with the answers to the interrogatories. On the 30th April, 1860, the Court, Monk, Justice, rejected the letters referred to: "Considering that it appears, from the "procceding and evidence of record, that, at the time of "seizure, the property and effects seized were in and upon the "co-partnership premises of Plaintiff and Defendant and "in the joint possession of Plaintiff and Defendant, and con-"sidering that it is not established that Defendant, previous "to the issuing of the process of revendication, or at any "time had refused to allow said property and effects to be "removed by Plaintiff; and that Defendant has so declared "in his plea; doth maintain Defendant's plea, and doth "dismiss Plaintiff's action with costs." On appeal from the judgment it was urged, on behalf of Appellant, that the judgment was erroneous and unjust, the Appellant having a right to legal recourse to recover his property; that this right was not affected in any degree by his having another action against Respondent arising from the late copartnership; that the absence of a demand for the particular property anterior to the seizure did not determine the question of property, nor preclude Plaintiff from his action. For the Respondent it was contended, that the seizure was vexatious and unnecessary, and was not preceeded by any demand or refusal, that the goods were never claimed by Defendant and were worthless, and had been put away for years in the garret of the shop occupied by the partnership, until within a few days.

Judgment of the Superior Court confirmed. (11 *D. T. B. C.*, p. 290.)

MONDELET, Justice, dissenting.

CROSS and BANCROFT, for Appellant.

A. and W. ROBERTSON, for Respondent.

SOCIETE.—RESPONSABILITE.

QUEEN'S BENCH, APPEAL SIDE, Québec, 20 juin 1861.

Before Sir L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN DUVAL, MONDELET and BADGLEY, Justices.

PREVOST et al., Appellants, *and* ALLAIRE, Respondent.

Une institution charitable, formée pour secourir les pauvres, nomma des délégués pour établir une Banque d'Epargnes. Ces délégués élirent un président et des directeurs qui adoptèrent certains règlements, et, entr'autres, un règlement interdisant tout profit aux officiers de l'institution. Des dépots furent reçus pour être remboursés avec intérêt, et des billets promissoires escomptés sur la responsabilité personnelle des individus. Sur ces escomptes, un *percentage* fut perçu par les directeurs, et une portion des fonds fut appropriée à leur usage en paiement de leurs services. La banque, ainsi établie, fut finalement close, comme insolvable, et une partie des dettes, dues comme dépots spéciaux, fut rachetée par les directeurs à tant dans le louis.

Jugé: Dans une action *d'assumpsit*, contre le président et plusieurs des directeurs, intentée par l'un des déposants, qui avait été un des délégués sus-mentionnés, pour tout le montant de ses dépots:

1° Que, sans égard à la question de fraude, de délit ou de quasi-délit, le président et les directeurs étaient devenus commerçants en s'immiçant dans une affaire de banque d'une nature commerciale, et étaient, conjointement et solidairement, responsables envers chacun des déposants, pour le montant de ses dépots. Et que, si le Demandeur avait approuvé des procédés des directeurs, soumis annuellement aux assemblées des déposants, son approbation, obtenue au moyen d'états faux, ne pouvait opérer à son préjudice.

2° Que l'institution charitable n'avait aucun intérêt dans la chose, et conséquemment qu'aucune action en reddition de compte ne pouvait être dirigée contre elle.

3° Que le président et les directeurs étaient devenus une société, ou compagnie non incorporée, et que l'action était bien dirigée contre l'un ou plusieurs d'entr'eux, en vertu des dispositions de la 12e Vic., ch. 45. (1)

Three appeals were instituted from a judgment of the Superior Court at Quebec, condemning Appellants, Louis Prevost, Augustin Gauthier, junr., Philippe Brunet and Louis Marois, to pay Respondent the sum of £165 13 7, with interest at the rate of 4½ per cent, and costs. The Appellants were sued as having carried on the business of bankers, under the firm of *Caisse d'économie de St. Roch*, trading et the city of Quebec as such. In the declaration they were stated to be copartners. and liable with others for the above amount deposited by Plaintiff, Etienne Allaire, as a depositor in the bank. The contract declared upon, to which was added the money counts, was the lending of the above sum, to be repaid on demand, after ten days notice. The defence to the action, on the merits, was a specific denegation that Defendants were copartners in the bank ; that, on the 3rd of March, 1848, there existed the society

(1) V. art. 1830, 1854 et 1865 C. C.

of St. Vincent de Paul, of which Plaintiff was a member, established for the benefit of the poor; that, at a meeting of a section of this society, Plaintiff was named a delegate to establish the basis of a savings' bank; that, at a meeting of delegates, Plaintiff being present, it was resolved that a savings' bank should be established, under the auspices of the society, at St Roch's; and that the five sections of which it was composed, should each elect ten members to be founders of a *Caisse d'économie de St Roch;* that Plaintiff was named a delegate from his section, and that the fifty members named three persons from each section to be directors; that on the 24th of March, 1848, the directors met and organised the bank, according to a plan adopted by them; that one of the regulations established was, that the bank should furnish each depositor with a pass book containing the regulations of the bank, signed by the president and directors, and that the pass-book contained a provision "that no member or director of the bank should have "the right of deriving any pecuniary advantage whatever "from the funds of the bank, but that a very surplus should "serve to form a reserved fund to cover losses and to augment "the rate of interest on deposits." That the bank was purely a benevolent institution, from which the founders were to receive no benefit; that Defendants received none; that, with all this, Plaintiff was acquainted, and he was cognizant of the business of the bank and approved of it. A special answer to this defence was that the society of St Vincent de Paul possessed no legal character; that it was composed of persons who met together and furnished means for the relief of the destitute poor; that they never did form a savings' bank, but that their name was assumed by Defendants to procure a credit from the poor and industrial classes; that Defendants were borrowers and lenders of money and traded in it: that there was no accountability in the society of St Vincent de Paul, and that the depositors acted individually and not as members of it; that the condition on the pass-book, as above pleaded, was illusory and put there to cheat and defraud the public, while Defendants were using the money of the depositors to their own profit; that the condition was expunged from the pass-books in 1853; that it was notorious that Defendants were dealing in the funds of the bank which they withheld from the poor, who had deposited their money, and were using it to purchase up for their own use the pass-books at a depreciated valuation, varying from seventeen shillings to two shillings and six pence in the pound, regulated by the misery and distress of the depositors. To this answer a replication was filed, alleging a crisis and a run on the bank, that the securities of the bank could not be realised, that Defendants

acted openly and in good faith, that their proceedings were submitted to the depositors, including Plaintiff, who approved of them, and that he was the cause of the panic and the ruin of the bank. Plaintiff proved that his pass-book was balanced on the 18th April, 1855, and £165 13 7 then carried to his credit by Brunet. This pass-book had the conditions printed upon it, that the directors should receive no profit, and that the depositors should give ten days notice before withdrawing their deposits. The Plaintiff produced the pass-book for 1853, shewing that the condition, as to profits or pecuniary advantage from the bank, was then dropped; that the office for conducting the business of the bank was situated at St. Roch's, that before April, 1854, the bank received from depositors £88,168 6 7, that Plaintiff's money, with that of others, went under the control of Defendants, that they discounted notes upon the personal security of individuals, that in 1848-49 Paradis and Prevost, Gauthier and Brunet were, or shortly afterwards, became, directors; that one of the earliest transactions of the bank was the discounting of five or six promissory notes amounting to above £3,000, for Alford, upon which eleven per cent was exacted, five for the president, Paradis, or his partnership concern, and six for the bank. That Prevost, who succeeded Paradis as president, received, for himself, a commission amounting to as much as five per cent upon the discounting of notes with but three months to run; that Bilodeau & Co., and Thornton Smith obtained discounts, the former to the amount of £10,000, upon which Prevost received a commission. Smith stated his discount to have amounted to £1000 or £1200, and that Prevost charged him for the most part five per cent for three months, and sometimes five and a half above legal interest; that this was in the years 1853-4. Prevost, examined on oath, says, "I never demanded or exacted a "commission or recompense for having discounted notes with the bank funds, but I received, in certain cases, an indemnity "for my time, &c." Upon being asked if it was understood, before the making of the loans, that he should receive an indemnity for his services, he says. "I think so, in some ins-"tances, for leaving my own duties, but I consider the indem-"nity so given by the parties as a matter altogether between "the party and myself, in which the bank had no interest." Prevost states also as follows: "It is to my knowledge that "Marois purchased the claims against the bank with the mo-"neys of his partnership with Lepage, under the name of "Marois & Lepage, with the understanding that he, Marois, "should be reimbursed his advances, out of the funds of the "bank, with interest, agreeing, on his part, to leave to the

"profit of the bank the profit of his purchases. He made "these purchases, as well in the interest of the depositors as "in that of the bank, at as high a rate as the means of the "bank seemed to shew, principally to meet the pressing wants "of the depositors, and to prevent the sacrifice of their claims "in the hands of speculators, so great was the alarm among "the depositors at the time the bank suspended. He has been "reimbursed out of the funds of the bank, but he is still con-"siderably in advance." At the taking of the evidence, the Defendants, after notice, refused to produce the books of the bank. Paradis who was examined by the Defendants proved the nature of the society of St. Vincent de Paul; he said "it "is not necessary to subscribe any sum of money whatever to "become a member of the society, the subscriptions are made "by a collection *(quête)* at each meeting, when persons give "what they choose, and the amount is distributed among the "poor by the members." It was also proved that the management of the business of the bank was in the hands of Defendants from March, 1852, to February, 1856, when the bank suspended payment. Several witnesses proved that discounts were made upon notes payable to the order of Brunet; that, at the office of the bank where Plaintiff, after the suspension, gave notice that he wanted his money, Marois and Brunet stated that they had in hand £14,000. As to the purchase of claims by Marois, and the nature of the business, this appears from the evidence of Mr. Dufresne, advocate, who was entrusted with an examination of the books after the suspension in January or February, 1856, by Prevost and Brunet. He swore that the books shewed the business to be that of a bank, that is, the receiving of deposits and the discounting of notes; that he himself had a claim for £80 and upwards, which he sold to Marois for £75; that there was a meeting of the depositors, held after his examination of the books, at which Prevost, Brunet and Marois attended, and promised to pay a dividend soon. Marois stated to this witness that he was purchasing the claims on his own account. The Defendants, by their evidence, established that the Plaintiff was one of the members of the society of Saint Vincent de Paul, and that he was one of the persons chosen by the different sections to lay the basis of a Savings' Bank. The proceedings of the directors, contained in a quire of foolscap, were produced by them, shewing the plan upon which it was originally intended that the business should be conducted. This plan, adopted by the directors in 1848, contained the regulation that the officers should receive no pecuniary advantage from the bank. The election of Marois appears by this book to have taken place on the 13th of March, 1852,

when Brunet, Prévost and Gauthier were elected, with some others, these three being then in office and called a discount committee. The first directors appear in this document to have been Paradis, Lefebvre Prévost, Gauthier, Huot, Paquet, Martel, Brunet, Guilmet, Dubois, Blais, Lapointe, Davidson and Laberge. Paradis was president and Gauthier secretary. The last election of directors, as ascertained from this book, seems to have been that including the four Defendants as above mentioned in 1852, this being the last entry of the proceedings. This document, in the hand writing of Gauthier, shews that there were taken out of the funds of bank, for his services, on the 12th April, 1851, the sum of £25, at a subsequent period a further sum of £25, on the 3rd of May, 1853, the sum of £55 16s. was paid to the officers Brunet, Prevost and Gauthier, and on the 26th April, 1854 the sum of £75 was taken by Prévost, Gauthier and Brunet, for their services. The witnesses of the Defendants state how the bank was founded, that fifty members were named for the purpose ; that these fifty members, composed of ten from each section, elected three directors, forming in the whole fifteen ; that Plaintiff voted upon the first choice of directors ; that the directors acted for one year, and to be renewed every year ; that the directors deposited the deposits in the other banks where they received from three to three and a half per cent on them ; that general meeting of depositors were called annually, to receive statements of the affairs. Martel, one of the first directors, states : " That, at the meeting of the fifty members, the directors made " their report upon the general state of the affairs, and these " members were supposed to be present. The fifteen directors " acted by five at the receiving of deposits, and acted conjointly " when they were convoked for an assembly of directors, that " is to say, five did the active duty during four consecutive " months, at the end of which they were replaced by five " others. By an active part, I mean that they received the " deposits and entered them in the books. While I was a " director the bank discounted notes. The directors named to " discount were the three officers, the president, secretary and " treasurer. The first president, I believe, was Paradis, but, I " cannot recollect if, in that year, notes were discounted. The " president who replaced him was Louis Prévost who, to the " best of my knowledge, has always been one of the discount " committee. Gauthier has always formed one of the com- " mittee, and, I think, Brunet did not come into it until after " the decease of Joseph Lefebvre, some months after my resi- " gnation. It was understood by the directors who named the " discount committee, that the rate of discount should be six " per cent, and it was, moreover, agreed that no note should

" be discounted without having, as security, besides a good " endorser, *coupons* and debentures of the corporation of the " city of Quebec, or of the government, to an amount equal to " twice the amount of the note; the last condition, to the best " of my knowledge, and the resolution to that effect, must be " inserted in the book of the minutes. It is not to my know- " ledge, personally, that the bank discounted note at a higher " rate than six per cent. It is not to my knowledge either, per- " sonally, that any of the directors received commissions for dis- " counting notes, and none of the directors told me so. Before " retiring, I examined the books; this examination was not satis- " factory to me, for this reason, that I perceived that all the en- " tries were not made, I mean to say that I never saw an account " of the promissory notes. This examination was made hastily by " myself, but the additions made by the secretary and book- " keeper showed, at the time, a profit of £100 for the deposi- " tors. It was then that I ascertained that no special and " detailed account of the promissory notes was kept, and that " the condition imposed by the directors to take security in " debentures of the government, and of the Corporation, was " not observed. If was, moreover, very difficult to see the notes " remaining in the hands of Prévost, who did, I think, the " work of three of the committee. The two Defendants Gau- " thier and Prevost were directors of the bank from the begin- " ning of it until the end, &c."

The judgment of the Court below, of the 5th of April, 1860, was as follows: " The court, it appearing that Defendants at, " before and after the thirteenth day of April, 1855, at the " city of Quebec, were associated as partners in a bank or " banking institution known under the name, firm and style " of *Caisse d'économie de St Roch*, and there carried on the " business of banking, by the discounting of promissory notes " and otherwise; it appearing also that, on the day and year " aforesaid, Defendants had, in the ordinary course of business " of Defendants, as such bankers, received from Plaintiff, a " deposit of £160 13 7; it appearing also, by a certain account " or pass-book, in the handwriting of one of Defendants, " which was delivered by Defendants to Plaintiff, that Defen- " dants had agreed to pay interest on the money to be comput- " ed at the rate of four and a half per cent. per annum, and that " the transaction between Plaintiff and Defendants, amounts " to a letting and hiring of money on a loan at interest; it " appearing also, that after the deposit aforesaid, to wit, from " and after the month of February, 1856, Defendants closed " the bank, and have, thenceforward hitherto, refused to pay " the depositors in the bank, including Plaintiff, the monies

" deposited by them; it appearing also, that the allegations " contained in the pleas of Defendants, respectively, are insuf- " ficient in law, and unfounded in fact, and, more particularly " the allegation that they are not liable as bankers, by reason " of the bank or banking institution having been formed at " the request of a benevolent society known as *La société de* " *St-Vincent de Paul*, and also the allegation that Defendants " received no personal benefit and advantage from the bank " as the same was established for the benefit of the poorer " classes; and, on the contrary, it appearing that Louis Prévost " one of Defendants, was permitted and allowed to trade with " the monies of depositors in the bank for his own personal " profit and advantage, and that Louis Marois, another of De- " fendants, has been occupied in purchasing the claims of the " of the depositors in the bank for monies therein deposited " by them at a reduced price, upon the representation that " the bank or banking institution, known as the *Caisse d'éco-* " *nomie de St Roch*, and composed of them, Defendants, is " insolvent and unable to pay its just debts; this court doth " condemn Louis Prévost, Augustin Gauthier, junior, Philippe " Brunet and Louis Marois, jointly and severally, to pay " and satisfy to Plaintiff, the sum of £165 13 7, with interest " from the thirteenth day of April, 1855, at the rate of four " and a half per cent per annum, till paid, and costs of suit." Three separate appeals were instituted from this judgment, one by Prévost, one by Gauthier and Brunet, and a third by Marois. For Prevost, it was contended that the contract between the parties was one of partnership, of which Respondent Allaire was a member; that he must bear a share in the profit and loss, and that his remedy was by an action of account arising from the co-partnership; that this Appellant, if he did make a profit out of the monies of the bank, made them as a private individual, and not as a director, and that Appellant was not a director at the commencement of Allaire's deposits. For Gauthier and Brunet, it was contended also that the association, termed the *Caisse d'Economie de St, Roch*, was not a commercial company but an *association civile*, in which the members were not jointly and severally liable; that Appellants, from the nature of their occupations, were not merchants or traders; that the association was composed of fifty members, the founders, and their action could not be brought against Defendants, who were the directors, *gérants*, and the latter could not sue in their name; that Plaintiff, Allaire, as one of the founders of this *association civile*, had no direct action against Defendants, but the action *pro socio*, or to obtain an account; that Defendants had acted as the delegates of a benevolent society, without any hope of profit personally, and if they had exceeded their

powers, Respondent could compel them to account. That the position of Brunet and Gauthier was different from that of Prévost and Marois, as they never purchased up the claims of the depositors, nor sanctioned their conduct. For Marois, it was contended that Allaire's money was deposited in December, 1853; that this Appellant never acted in any way in the bank until 1855; that he never accepted the office of a director, but acted only as a deputy or *employé* of one of its officers for a short time after the 1st January, 1855; that the partnership known under the name *La caisse d'économie de St. Roch*, was composed of the depositors of money therein; that Allaire was one of the members of the partnership; that the officers of the parnership were but the *mandataires* of the partners; that Respondent could not bring an action against Defendants as having carried on business in partnership with others, not disclosed in his declaration, when he himself was one of the partners of the partnership so sued; that there was no act of Marois which in law would constitute him a partner and that as respected the purchase of claims, these purchases were not proved to have been made before action brought.

For the Respondent, it was contended that the society of *St. Vincent de Paul* being, beyond all question, merely a charitable association for the support of the poor, the nomination of the fifty persons to organize a savings bank was only to encourage the poor classes to lay aside their small earnings to provide for their wants; that the intention was to establish a savings' bank, with the guarantees to the public, established by the Provincial Statute, 4 and 5 Vict., cap. 32; that no savings' bank was ever established, but, on the contrary, a deceptive institution was organized, upon a plan adopted by the directors first chosen, which did not appear ever to have been communicated to the society of *St. Vincent de Paul*, or the fifty delegates, at that it was never sanctioned or approved of by them; that it was not approved of by the depositors, beyond the conditions printed on the pass books; that it was only at the commencement that the mere form of election of directors took place; that the subsequent elections were irregular, and nothing but the perpetuation of the powers of the persons who had drawn into their own hands all the funds and dealt with them for their own profit; that Defendants having monopolised the whole power, three of them being, not only directors, but president, secretary and treasurer, for four years previous to the suspension, derived personal profit from the association; that the last entry in Plaintiff's passbook, being one of April, 1855, two years after the election of three of Defendants, and the nomination of Marois, and all having assumed and conducted the whole business

from 1852 to 1856, when the suspension took place, receiving a profit in the proportions settled among themselves, shows clearly that they were co-partners in a banking concern. If Prévost received a commission from five per cent to a half per cent upon notes of but three months to run, and the other Respondents signed the chèques for the discounts, which they did, the acts of Prevost were the acts of all, and it was not for Respondent to show how they settled the profits among themselves. While Marois was a director, the condition prohibiting the receipt of pecuniary advantage by the officer was expunged. A new organisation was therefore established to cover the cases of directors trading upon the monies, and of the other officers receiving pay for their labor. When the election of directors ceased in 1852, then Appellants, by discarding the system of elections, and taking the whole of the funds into their possession, became an unincorporated company for trading purposes, that is for banking. The whole course of the proceedings of the company or bank, from its beginning until its suspension, shewed that the countenance of the society of *St. Vincent de Paul* was obtained to induce the poor classes to part with their money to be turned to the use of Paradis, Prévost, Gauthier and others. Marois traded upon the misery of the poor depositors for the benefit of himself; that it was for the bank, as Defendants pretended, was out of the question, as there was no bank in which the depositors had any share, the instant they sold their pass-books, they came to be excluded by the sale, and supposing that Defendants had succeeded in buying out the claims of all the depositors there would have been no other proprietor of the funds of the bank than the purchaser or purchasers, Marois and others. As respected the pretension that an action could be brought against the fifty delegates, no action could be brought against them or the society of *St. Vincent de Paul,* any more than against the citizens of Quebec holding a public meeting and approving of the formation of any public enterprize; these fifty persons had no pecuniary interest in the matter, and incurred no personal responsability. The depositors did not form portion of any company; they did not elect the directors, and these directors did not act as their attorneys, but entered into an express contract with the persons composing the *caisse* or bank, whoever they might be; that they would return sums lent with interest in consideration of the use of them; that the money awarded in the court below to Respondent, was money had and received to his use by Defendants, who, in his pass-book, in 1855, admitted his balance to be £165 13s 7d. The french and english law admits of co-partnerships being formed without any express agreement or writing. The mere

acts or course of dealing of parties will constitute a co-partnership and an unincorporated company; that the contract between the depositor and the banking company was a loan for the use of Defendants, or the company of which they formed part, by which Plaintiff in the court below transferred to the company, or bank, the property in a sum of money in consideration of there being returned to him a like amount. The following are the grounds and authorities submitted in support of the judgment in the Court below: 1° That the *Caisse d'Economie*, termed the saving's bank of St. Roch, was not a saving's bank, because none of the provisions of the 4 and 5 Victoria, cap. 32, had been complied with, these being essential to the existence of a saving's bank in Lower Canada; but, on the contrary, that an unincorporated company, in co-partnership for banking purposes, had been formed, the members of which were self constituted and derived a profit from the business, and became therefore liable for its debts; 2° That the contract between this unincorporated company or partnership was a loan known in the french law as the *prêt de consomption, mutuum*, which is thus defined by Pothier. "Le contrat de "Prêt de consomption est celui qu'on appelle *mutuum*. On "peut le définir un contrat par lequel l'un des contractants "donne et transfère la propriété d'une somme d'argent ou d'une "certaine quantité d'autres choses qui se consomment par "l'usage, à l'autre contractant, qui s'oblige de lui en rendre autant (1)"; 3° That there was no partnership between the society of *St. Vincent de Paul* or its delegates and the directors of the bank. The society was purely a benevolent institution, it had no interest in and derived no profit from the businesss, and there were no matters of account between it or its delegates and the directors, and they had no right, therefore, to ask for an account of the business from the directors, and as respected the pretension that a partnership existed between the directors and the depositors, the nature of the contract negatived any thing of the kind, the terms of which were that upon a deposit of so much money the same would be returned on demand, after ten days notice, with interest at the rate of 4½ per centum per annum. The depositors, therefore, were to suffer no loss, and, as respected profits, there was no promise that they should receive any. If profits were made after the payment of interest to depositors, these could not go to the latter. Depositors made their deposits one day, and others withdrew them, old accounts were closed and new ones opened, so that the body was continually changing, but the

(1) *Traité du contrat de Prêt de Consomption*, Nos. 1, 18, 23, 27, 35.

directors remained the same. The profits could therefore have been retained by the directors, and if any demand had been made for them by the depositors the answer would have been "we have paid or are ready to pay you your principal and interests, you agreed for so much and you can get no more"; 4° That by the act 12 Victoria, ch. 45, intituled: "An act to facilitate actions against persons associated for commercial purposes, and against unincorporated companies:" the directors should have filed with the prothonotary of the Superior Court, and with the registrar of the county, a declaration in writing of the names of the persons who carried on the business of this bank, and their not having done so rendered any one or more of them liable, as stated in the Respondents declaration in the Court below.

BADGLEY, Justice, *dissenting*: The circumstances in connection with this case, the number of claims awaiting the final decision on this one, the loss of their deposits incurred by a number of poor persons, and the probable ruin of Appellants from an unfavourable judgment against them, naturally require that minute care and attention should be given to the case itself, and that an utter absence of feeling should prevail in its investigation. There are three appeals, moreover, and they have arisen from the judgment of the Superior Court in this suit, instituted by Allaire, Respondent, as Plaintiff, against Gauthier and the other Appellants as Defendants, for the recovery from them of a sum of money and interest thereon, and for which he demanded their joint and several condemnation in his favour, upon the grounds set out in the counts of his declaration. These are in the common form used in practice, namely; the first declares against Defendants that "they, "on and before, and since the 30th of April, 1855, were "jointly, with other persons, associated as partners for trading "purposes, at Quebec, under the name and firm of *Caisse* "*d'Economie de St. Roch*, and then and there carried on the "business of bankers, and as such partners and bankers" received in loan from Plaintiff £165 13 7, which they agreed to pay him with 4½ per cent interest, after 10 days notice duly given on the 19th January, 1855. The 2nd count charges their indebtedness as of the 19th June, 1856, *being such partners traders and bankers*, under the money, interest and account stated counts. The 3rd count charges Defendants with a loan on the 30th April, 1855, of the above sum, which they and the other persons aforesaid agreed to pay to Plaintiff as in first count. Then follow the money counts, for money lent and advanced &c., the common breach with conclusion against Defendants for their joint and several condemnations: to the first and second counts is also added the allegation that

Defendants had not made delivery of the declaration of their association, as required by the statute in such case. The Plaintiff's action thus settled by himself is in common assumpsit form against Defendants, as partners, traders and bankers trading together at Quebec under the firm of the *Cassse d'Economie de St. Roch*, and as such making the alleged contract with Plaintiff. The complication in this case has arisen from the pleadings, and first from the severance by Defendants in their pleas, which however they could not otherwise do without appearing to admit the partnership and trading qualities imputed to them. Without adverting to the preliminary pleadings which were disposed of by the Superior Court, their defences upon the merits present a general similarity to each other, as well in substance as character. Taking issue with and denying the facts and allegations set out by Plaintiff, they rest their defence upon the circumstances connected with Plaintiff's acts from the formation of the *Caisse d'Economie de St. Roch*, inclusively down to the institution of the action. They state, as matter of fact, that in 1848, a charitable association, called the society of *St. Vincent de Paul*, existed in the parish of St. Roch, and was divided into five sections or *conférences* for carrying out its work of charity ; that the leading men of the parish seeing that the larger portion of the parishioners consisted of mechanics, shipwrights, &c., whose means of subsistence were precarious, suggested to the conferences the propriety of establishing a *Caisse d'Economie*, in aid of the Society, to receive and put aside the savings of these people ; that the suggestion was adopted by the conferences, who each selected 10 of their number who should assemble together and carry the suggestion into effect. The Plaintiff, a member of the conference of St. Louis de Gonzague, was one of the ten elected by that conference, and with the other delegates from the other four conferences did in fact organize and establish the institution under the name of the *Caisse d'Economie de St. Roch*, as for and with a charitable purpose and character ; that these delegates appointed themselves to be its permanent founders, chose three from each delegation, making fifteen in all, as its directors, and charged five of the fifteen, one from each conference, to assist in turn for a period of four months to act as such directors in the active business of the *caisse*. In addition to the direction, officers consisting of a President and his Vice, a Treasurer and a Secretary, with assistants to act for the two latter in case of their absence, were also appointed ; and that rules and regulations for the guidance and information of parties interested, depositors and the public in general, were adopted and required to be inserted in

the deposit books to be issued to the depositors : it is also stated that the *Caisse d'Economie de St. Roch* was set into operation with the participation of Plaintiff, that its proceedings were public and open, and known and acquiesced in by him, that he was one of its depositors and received a a deposit book with the rules inserted therein, that the Defendants were merely the officers of the *Caisse d'Economie de St. Roch*, and derived no pecuniary advantage from its business, or profits, the surplus, after paying expenses, being applied to the increase of the interest of the depositors ; that Defendants were not the *Caisse d'Economie de St. Roch*, nor copartners, traders nor bankers, as alleged by Plaintiff, and that they never contracted with the Plaintiff nor borrowed or received money from him, as alleged. This defence is nothing more nor less than the general issue, but Plaintiff notwithstanding filed a special answer to it, in which he charges Defendants with the fraudulant use of the of the society of *St. Vincent de Paul* to obtain a credit for themselves amongst the poor, and to allure their money from them ; he asserts the want of legal character, rights or powers, in that society, that it had formed no association to establish a savings' bank, that the approval of Defendants as directors of the *Caisse d'Economie de St. Roch*, did not relieve them from their personal liability as borrowers of money and traders therein ; that Plaintiff and Defendants were mere lenders and borrowers of money, subject to the agreement between them, that the rules were only a public notice of the terms on which Defendants borrowed money, that the rule against pecuniary advantage to the members and directors of the *Caisse d'Economie de St. Roch* was illusory and only intended to attack deposits, whilst Defendants used the money for their own advantage and to cheat and defraud the public and the depositors, and that the said rule was abandonned by Defendants, who publicly dealt in the funds of the *Caisse d'Economie de St. Roch*, and withholding them from the depositors, extorted money from them by the purchase from them at a great sacrifice with their own money of their deposit books ; that they assumed to act under the auspices of the society as a cover for their own trading and personal advantage, and as a lure and inducement to persons, including Plaintiff, to make deposits with them which were in fact taken by Defendants for their own advantage and that of each of them ; wherefore Plaintiff prayed not alone for the dismissal of Defendant's pleas, but, further, also prayed for the same conclusion as demanded by his declaration, to wit, the joint and several condemnation of Defendants ; thereby assuming two grounds for this conclusion, the first, upon the plan *assumpsit* grounds set out in the declaration,

and the second upon the charges of fraud and misfeasance set out in the special answer. The Defendants demurred to this answer, but the court ordered the parties to complete the issues, and thereafter to go to proof, *avant faire droit*; whereupon Defendants denied the allegations of the answer, maintained the charitable character of the *Caisse d'Economie de St. Roch*, and its connection with the society, denied that its funds had been improperly or fraudulently used by them, as alleged, reiterated Plaintiff's full cognizance of and participation in the formation and establishment of the *Caisse d'Economie de St. Roch*, and his acquiescence in its transactions, which were open and public, and only became deranged from a run made upon it, mainly caused by Plaintiff himself, at a period of general distress, and that they derived no profit or pecuniary advantage from its funds. The issues, as ordered, were completed by a general replication filed by Plaintiff, and the case was inscribed for evidence. As already observed, the action originally was in the common *assumpsit* form against Defendants, as partners and bankers, trading under the firm and name of the *Caisse d'Economie de St. Roch*, upon the alleged contract entered into by their partnership with Plaintiff; Defendants in reply deny the partnership and contract, and Plaintiff in answer to this denegation charges them with a fraudulent conspiracy under the name and auspices of the society of *St. Vincent de Paul* to obtain a fraudulent credit for their personal profit, fraudulently to allure to themselves the deposits of the poor, and to cheat the public and Plaintiff in particular, in other words, Plaintiff charges them in his answer to their general denial of his alleged grounds of action, as set out in the counts of his declaration, with a criminal conspiracy to obtain from the public and from himself money under false pretences, and for these reasons he prayed for their joint and several condemnation. It will suffice to remark that this case pointedly illustrates the necessity of adhering to the common rules of pleading, and of not permitting one cause of action to be set out in the declaration, and another in a subsequent pleading with separate and independent conclusions to each. In this case both law and practice justify the rejection by this court of this irregular pleading, and the testing of the original issues by the evidence adduced. This course however will not be adopted, and it therefore becomes necessary to examine in detail a mass of evidence which has materially added to the complication first introduced by Defendants' severance in pleading. That evidence, analyzing it as adduced by both parties, resolves itself into the following particulars alone : 1° That of a character common to the parties and to the case generally, namely, the existence of the charit-

able society of *St. Vincent de Paul at St. Roch* in 1848, the suggestion made to the conferences and their approval of the establishment of the *Caisse d'économie de St. Roch*, in connection with that society, their selection of delegates amongst whom was Plaintiff for the purpose, and who carried it into effect and established the *Caisse d'économie de St. Roch*, in operation on the 24th March, 1848, for charitable purposes in connection with the society, those delegates, fifty in number, including Plaintiff, being its permanent founders; the appointment of a board of direction to superintend its affairs, with officers to perform the active duties of the *Caisse d'économie de St. Roch*, the adoption of rules, &c., the publicity given to its proceedings at its annual meetings in the reports of its auditors and in the publication of the annual statements, that no other *Caisse d'économie de St Roch*, or association under that name, existed in Quebec, except this *Caisse d'économie de St Roch* so established, that its business transactions of deposits and withdrawals, &c., were conducted at its known office at St Roch, that its funds were deposited in a chartered bank in the city of Quebec, and drawn out by checks which required the signature and counter-signature of two of the officers to render them valid; that its affairs were managed and controled by the board of directors, five in number, one from each conference, and acting for four months at a time, that within a year or so from its establishment, the directors resolved to discount notes in order to meet the interest allowance of 4½ p. cent to depositors, and to pay expenses, the bank interest on their funds being less than that allowance, that this discounting, adopted in 1850, was then made known and openly continued, not only without objection by the depositors, but with their acquiescence, the surplus profits being for the increase of their interest, and that the operation was publicly reported and published in their annual statements of 1851 to 54, both inclusive; 2° that in connection with Plaintiff and his acts and doings, namely; that he was a conference delegate, an establisher and founder of the *caisse*, that he only withdrew from his conference in 1856, about the time of the institution of this action, and has not shewn his withdrawal from his foundership; that he was one of the earliest depositors in the *caisse*, his account being n° 16, and his first deposit as shown in his exhibit n° 23, his deposit book, being on the 1st April, 1848, at a period of a week after the *caisse* had gone into operation. His knowledge of the connection of the *caisse* with the society is proved by that book, its title page, being as follows: *Société de St. Vincent de Paul, Caisse d'Economie de St. Roch, Extraits des règles et règlements, 1848*, that he again deposited on the 16th of the same April, and withdrew

his disposits in June of the same year, renewing his deposits in April, 1851, with £100, with subsequent deposits until March, 1853, when his balance was £200 5 9, which be reduced in March, 1855, to £150 5 9, which sum was to his credit at the time of the suspension, and which, with interest added to 1856, is the sum demanded by this action. This deposit book was received by him from the original *caisse* which he had assisted to form and establish, that his first and all his subsequent deposits were made in the same *caisse*, and these and his withdrawals and the settlement of interest due, were all transactions between him and that same *caisse*, and were all entered in his deposit book at and by the same *caisse* and by its officers: that no other such *caisse* existed but this one of which he was a founder, and in which he had made his deposits, which he knew, none other having been proved to have existed; his cognizance of these facts, as well as of the existence, object, character and operations of the *caisse*, with which he was dealing, and of the action of its officers, and the extent of their connection with these dealings, cannot be gainsaid nor contradicted, moreover, the only proof of any contract of loan or deposit whatever made by him to any association is afforded by that book alone, which must be taken as it is. 3° The proof for and against Defendants is as follows; they were the officers of the *caisse*: Gauthier, secretary from shortly after its formation in 1848, Brunet, treasurer appointed in 1851-2, Prévost was president in 1852, and continued in office subsequently, and Marois acted as assistant to both secretary and treasurer in 1854; at a previous period Marois appears to have been a director, namely from 3 or 4 years before its suspension; neither Gauthier, Brunet nor Prevost are proved to have been directors, although some of the witnesses believe they were such, *quia* they saw them receiving deposits and signing checks. Gauthier is proved to have been paid a small sum in two or three different years, in payment of extra services for keeping the books: Brunet never received any sum whatever, no testimony otherwise connects them with the *caisse*, and no evidence whatever proves them to have been partners, bankers and traders, under the name of that *caisse* or in any way or with any person. It is in evidence that Prévost did receive applications from individuals for discount of notes to a large amount, to be done by the *caisse*; as president of the *caisse* the applications would naturally be made to him, especially as his own office was in the business part of the city, and he was more accessible there than a direct application would be at the office of the *caisse* in St. Roch; that the notes were regularly discounted at the *caisse*, and not by himself, at the legal rate of 6 per cent, charged and received

by the *caisse;* that Prévost received from some of the discountees a commission or bonus out of the proceeds of the discount for his personal trouble, without any detriment or reduction of the funds of the *caisse,* but in this commission neither Gauthier, Brunet nor Marois participated, nor is it in evidence that they were made aware of that fact. That Marois was a director, and, after the suspension, bought up at a discount depositors books representing a large amount, by means which his partner positively swears was his own, and which is vaguely and not satisfactorily asserted to have been by the funds of the *caisse;* that the purchases were made for the *caisse* itself, and have been held by Marois to cover his advances and interest thereon; again in these purchases of Marois there is no evidence connecting either Gauthier and Brunet, or even Prévost, with them, nor is it shown that they were depositors and might profit by them. The foregoing is a correct analysis of the evidence; at the argument of the cause, Allaire's counsel, unequivocally abandonned the ground of fraud charged upon Defendants, and explicitly rested his case solely upon the contract; this was judicious, because the allegations of fraud in the special answer have not been proved, and yet that point will, notwithstanding, form the chief if not the only ingredient of the opinions maintained by some of my colleagues in this court for confirming the judgment of the Court below. Setting aside then the ground of fraud, it is difficult to conceive in what manner Marois' purchases after the suspension, or Prévost's receiving applications to submit notes to the *caisse* for discount in a regular way, and his subsequent acceptance of a bonus from the discountees, can establish the alleged copartnership amongst the Defendants in their trading and banking; it is equally difficult to conjecture from the evidence, and particularly from Plaintiff's books, how Defendants could be in partnership in April, 1855, and June, 1856, and be charged with deposits made by him in 1851-2 and 1853, in his own *caisse,* established and founded by himself, of which he then was still a founder and continued so to be at the time of the institution of this action, and of which he knew that Defendants were only the officers, or acting as such, and some of them not even such when those deposits were made. The evidence shews no fact from which the Defendants can be conceived to have been copartners as alleged at any time, whilst Plaintiff's own evidence shews that his contract was made with the original *caisse,* and not with Defendants. Had they been the originators or promotors of an abortive association, that had not gone into effect, it might have been asked whether a partnership or quasi partnership liability to restore the deposit received by them might be admitted; but, on the

contrary, the *caisse* went into operation and continued in active existence for 8 years, was established and founded by Plaintiff and his co-delegates, and not by Defendants, is not yet extinct, and may be wound up and an account rendered of its transactions, and it may be that Plaintiff may then receive his balance in full. To constitute a copartnership, the parties must act as partners, or must hold themselves out as such, or must be in a situation to participate in the profits of a concern, or must have participated in the profits; this case presents neither of these conditions, nor does it show any voluntary agreement by Defendants. *de mettre en commun certaines choses, dans le but de partager ensemble les gains que peut engendrer l'exploitation de ces choses.* Even admitting that the *caisse*, by its course of discounting, had become a banking and trading concern, that fact, a matter between third parties and itself, could confer no peculiar right upon Plaintiff against Defendants, its officers, except in case of their malversation or misfeasance, or for an account of their doings as president, secretary and treasurer, but could not make them personally liable for the balance due to its customers and depositors: it would be equally just and legal to make the cashier of a chartered trading bank so liable, and yet the effect of the final judgment to be rendered by the majority of this court will sustain that proposition. As already observed, cases of this description, in which large numbers of poor people are shown to be sufferers naturally create a feeling in their favour, but sympathy with their sufferings is no sufficient ground to depart from the claims of justice which belong to all suitors, and which requires that judgment should be rendered according to the law and the real evidence of the case: after attentive examination of the pleadings and careful analysis of the evidence, the judgment appealed from does not appear to be susceptible of confirmation and should be reversed.

AYLWIN, Justice: In adjudicating upon the matter, let the question of fraud, *délit* or *quasi délit*, be set aside, and the case regarded strictly as a commercial contract. The society of *St. Vincent de Paul* has nothing to do in the case, no more than the society of *St. Joseph*, or that of the *Congréganistes*, and although an association such as that of *St. Vincent de Paul*, might be used for the formation of a Saving's Bank, and use its influence to induce persons to lay aside their earnings, the legislature has passed laws, as respects the organization of these Saving's Banks, of a nature to prevent individuals, assuming to be directors or *gérants*, from possessing themselves, by acts of spoliation and robbery, of the small earnings of the depositors under the mask of benevolence.

Under the auspices of the society of *St. Vincent de Paul* the proceedings to organize a Saving's Bank were well and properly commenced. The monies which were first deposited, were placed in the Quebec Bank, and then employed to advantage. Subsequently, however, the whole was used, managed and turned to the profit of four or five individuals who possessed themselves of the monies, and acquired all the power of and governed the institution. In imitation of other banks, they arrogated to themselves the right of making a greater amount of profit, and for a time succeded, but under such circumstances as to incur certain obligations which the law has imposed upon them. Was the association styled the *Caisse d'Economie de St. Roch*, a commercial copartnership or was it not ? The term *Caisse* certainly does not imply merely a strong box encircled with iron bars and furnished with a key. The persons who composed it, the directors, *gérants*, are prohibited by law from carrying on trade without recording their names ; a particular statute imposed upon the members of this association the obligation of stating who were the members of it. Artistically enough, under the name of *Caisse*, they assumed to themselves the power of doing what they pleased with the funds of the depositors, and what has been the consequence ? The seat of their business came to be an obscure locality in the office of a notary. Applications were not made at any known office, but secretly at the president's office, and loans were made, not upon the security of debentures, or other public securities ; in one word, discounts were allowed upon the credit of individuals. What right had these persons, the Appellants, to do this ? it was in fraud of the depositors, but the profits were considerable, and instead of lending money at the rate of six per cent, ten per cent was taken as in the case of *Bilodeau & Co.*, and *Thornton Smith.* With all this the society of *St. Vincent de Paul* had nothing to do, and, most assuredly, it did not contribute the funds for the carrying on of this business. Whatever the ordinary occupations of Appellants may have been, in the transactions adverted to, they became traders. As originally intended Appellants were not, individually, to receive any benefit or advantage from the profits of the *Caisse d'Economie.* In the pass-books there is an express condition to that effect. The question is, have those persons, notwithstanding, individually profited from the business. Each discount made was a transaction intended for profit, and if they have individually profited, they are individually answerable. The business carried on through Prévost comes under the popular designation of shaving, and he extorted the premiums of a shaver. As respects the other

Appellants they were placed as a guard to protect the interest of the depositors by a regulation which required the signatures of two of them before the monies could be appropriated. They gave their signatures to Prévost, by so doing they approved of his conduct and participated in his dishonest profits. The Respondent Allaire requested the production of the book so as to obtain a faithful *exposé* of the business. This Appellants have refused, and they still keep them concealed, and why? it can be for no other reason than to hide their fraud which would have been made apparent by their production, and because they would have exhibited a dishonest appropriation of the funds of another. As respects their liability it is not affected by any question as to the exact portion of the booty which each may have secured for himself. It has been contended that Respondent Allaire participated in the business and approved of the manner in which it was conducted, because at public meetings Appellants received thanks for their management. Supposing that he did so, it was upon the false representations of Appellants, made from year to year, and what do we find at the end of them? A general bankruptcy. Then again, have these individuals called a meeting of the poor and unfortunate sufferers; have they confessed that they have done what they ought not to have done? No, they have not, they continue the same course, and here Marois appears upon the scene, and through him the unfortunate individuals are, from poverty, forced to sell their claims to him. He, with the assistance of Lepage who has not been made a party to this suit, has been engaged in the infamous traffic of speculating upon the misery of the poor and unfortunate depositors. Then, as to the form of the action, which has been objected to. The action as it has been instituted is perfectly applicable to the case. Again, it has been argued that Appellants were not in office throughout the period within which Respondent made his deposits. The answer is, that they renewed the entries in the books every year while they carried on the business, and thereby agreed to pay the balance after ten days' notice. The obligation of Defendants became direct and personal, the moment that they commenced trafficking as bankers. The contract between Appellants and Respondent involved an express direct obligation to repay so much money with interest at the rate of 4½ per cent for the use of it. The special answer of Respondent has also been objected to; this again sets up the fraud of Appellants, and is perfectly correct as it applied to the original contract. The case is one of the greatest interest to society, and it is fitting that the public should know that there is a tribunal which can control individuals in their management of such a concern as this bank is proved to have been.

MONDELET, Juge : Cette importante affaire, très-compliquée à première vue, en est une assez simple. Un individu place des fonds entre les mains de certaines personnes qui se donnent comme gérants ou directeurs d'une institution appelée " Caisse d'économie de St Roch," à la condition qu'on lui payera certains intérêts, et que sur avis de 10 jours, il aurait droit de retirer ses argents. Je dois, de suite, remarquer qu'il est oiseux de se cramponner au chef de la déclaration qu'on prétend reposer exclusivement sur un contrat ; il y a dans cette déclaration nombre de chefs, on ne s'en est pas plaint, dans tous les cas, la cour de première instance n'a pas fait justice de cet amalgame, de cette mosaïque de diverses formes d'action, nous l'acceptons, avec les parties qui s'en sont fait la loi et la règle de la cause, et de son instruction. Je ne vois pas de nécessité de s'occuper de la question qu'ont soulevée les Défendeurs, savoir : qu'ils étaient alors les gérants de la Caisse d'économie de S- Roch, et qu'on ne peut s'en prendre à eux que par une action en reddition de compte. Je dirai néanmoins, en passant, que cette prétendue organisation ou constitution de l'association en question, est loin d'être prouvée. Mais laissant cela de côté, il y a un fait qui ressort du témoignage, c'est que ces prétendus gérants ont pris sur eux de faire le commerce de banque, et ont, par là, frauduleusement, dans le sens légal, du moins, détourné, sur leur propre responsabilité, des deniers déposés entre leur mains, dans un but louable, dans le principe, comme devant être avantageux à ceux qui déposaient ainsi ce qu'il réussissaient à mettre de côté dans leur propre intérêt, et surtout dans l'intérêt de leurs familles. Ayant ainsi fait le commerce de la banque, et détourné ces argents, les Appelants qui ont agi de concert, dans cette fraude, sont solidairement responsables envers l'Intimé. Mettant de côté la question de fraude, et n'envisageant les Appellants que comme associés dans l'affaire dont ils ont assumé la responsabilité, c'est-à-dire escompter aux uns et aux autres des billets, au moyen de deniers qui avaient été déposés entre leurs mains, par l'Intimé et autres, ils sont solidairement tenus envers ces individus, et nommément envers l'Intimé, de leur remettre ces argents. Quant à l'avis de dix jours, à l'occasion duquel les Appelants ont fait une si triste chicane, il n'a pu être donné régulièrement pour la meilleure toutes les raisons, c'est que la banque, où la maison d'affaires des Appelants, étaient fermée, (cela est prouvé) et qu'il va sans dire, que ceux dont on avait divertis, de la sorte, les deniers, devaient sans perte de temps, prendre les moyens de se protéger. Au reste, comme je suis d'avis que cette institution n'était pas légalement et régulièrement constituée, il m'importe peu que l'avis de dix jours ait été ou non donné, l'Intimé qui avait déposé ou prêté son argent le

redemande, on l'a dépensé ou gaspillé, on ne le rend pas; *indè*, l'action actuelle qui, suivant moi, est bien fondée. J'adopte, sans difficulté, la conclusion, c'est-à-dire, la condamnation que comporte le jugement de la cour de première instance; mais quant aux motifs, ils me paraissent inexacts, entre autres, que les Défendeurs étaient membres d'une société " Under the firm and style of *Caisse d'économie de St Roch*," je ne reconnais pas cette société comme légalement constituée. Ainsi, je suis d'avis qu'il faudra, tout en condamnant les Défendeurs-Appelants, faire reposer le jugement sur ce que: 1° Vu la fraude, attendu que le Demandeur a déposé ses argents entre les mains de gens qui se disaient les gérants de cette prétendue association, et qui ont détourné ces argents etc; 2° que s'étant immiscé, sur leur propre responsabilité, dans un commerce de banque, il l'ont fait au moyen des argents déposés par le Demandeur et autres, ont perdu ou gaspillé ces argents, et sont tenus, solidairement, de les rembourser au Demandeur Intimé. La cour, c'est-à-dire, la majorité des juges, adopte ce motif, qui sera celui de son jugement, par lequel le jugement de la cour de première instance est confirmé.

Sir L. H. LaFontaine, Bart., Chief-Justice: Said that the *Caisse d'Economie de St. Roch* was commenced under honorable auspices. The parties who were active in the conduct of the business should have seen that there were annual elections, and that the directors, according to the original plan, received no salary. An adherence to the original organization lasted but for a time, when Appellants settled themselves down permanently, (*en permanence*), as the parties individually who carried on the business. From the commencement, there appears to have been an *arrière pensée* in the first president who profited from discounts made at the rate of ten per cent. It appears also, that Appellants have in hand about £14,000 which they retain. The whole conduct of Appellants manifests a plain case of fraud, *(escroquerie)*: " The Court, considering that it is in evidence that Appellants have made themselves parties to a banking business, (*se sont immiscées dans un commerce de banque*) which they have carried on with the funds of the association, known by the name of *Caisse d'Economie de St. Roch*, and that thereby they have rendered themselves liable, jointly and severally, to Respondent, for the repayment, with interest, at the rate of 4½ per cent, of money by him deposited in the bank, (*Caisse*), as a special deposit, and, inasmuch also as the judgment of the 5th of April, 1860, appealed from is correct in the amount awarded, this court confirms said judgment." Mr. Justice Duval and Mr. Justice Badgley, the latter appointed to

supply the place of Mr. Justice Meredith, dissented from the judgment. (11 *D. T. B. C.*, p. 293.)

TASCHEREAU, for Prévost.

TESSIER, for Brunet and Gauthier.

KERR, for Marois.

STUART, G. OKILL, Q. C., for the Respondent Allaire.

Memorandum of authorities cited by Appellants: Duvergier, vol. 5 p. 20; Toullier, Nos. 316 and 317, p. 372; 12 Dalloz, vbo. *Société*, p. 82; 17 Duranton, No. 455, p. 508; *Nesbitt* vs. *Turgeon*, 2 *R. J. R. Q.*, p. 141; Persil, *Tr. des Sociétés*, art. 32, pp. 112, 125; Dalloz, *Dict. de Jurisprudence*, vol. 5, Supp. 982; *Ib.*, p. 181, *Action Judiciaire*; Poncet, *Des Actions*, 209, 210; Dalloz, *Juris. Univ.*, 1830, p. 432, No. 17, *Index analytique*; Troplong, *Société*, Nos. 2, 4, 6, 8 and 11; 7 Duranton, Nos. 3 and 6; Delangle, *Société Comm.*, 1, 2, 7 and 10; Additional authorities cited by the Respondent; Pothier, *Societé*, Nos. 56, 57, 58, 59, 60 and 61; Persil, 125 to 141, arts. 29 to 37.

PROCEDURE.—OPPOSITION.—PREUVE.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 1er Juin 1861.

Before Sir L. H. LAFONTAINE, Bart., Chief Justice, AYLWIN DUVAL, MEREDITH and MONDELET, Justices.

BONACINA, Appellant, *and* MCKINTOSH, Respondent.

Une opposante, résidant en Ecosse, produisit une opposition en 1859, comme légataire en vertu d'un testament par lequel le testateur lui léguait "la somme de £50 sterling, annuellement, pendant sa vie durante," réclamant son legs sur les deniers provenants de la vente d'une terre délaissée par le testateur, vendue par décret après son décès par les créanciers de son fils, un des légataires universels.

Le rapport ou projet de distribution, par lequel l'opposante était colloquée pour une partie de la somme réclamée, fut contestée par la Défenderesse, veuve de l'un des légataires universels, et tutrice de ses enfants mineurs, par la raison que l'opposante n'avait jamais résidée dans ce pays, et qu'elle était morte dès avant le décès du testateur, qui était arrivé en 1842.

La réponse à cette contestation était général et il ne fut produit aucune preuve de part ou d'autre:

Jugé, dans la Cour Supérieure, Montréal: Que l'*onus probandi* du décès de l'opposante incombait sur la partie qui l'avait allégué.

En Appel: Qu'il incombait à l'opposante d'établir son existence. (1)

This was en appeal from a judgment of the Superior Court, Montreal, rendered on the 31st December, 1859, on a contestation, by Defendant, of the opposition of Jane McKintosh, an opposant *à fin de conserver.* (2) Only one point was argued in appeal, which was as to whether the *onus* of proof of the existence or death of Jane McKintosh was, under the pleadings and facts of the case, thrown upon Appellant or upon

(1) V. art. 1203 C. C.

(2) *Vide* 7 *R. J. R. Q.*, p. 366.

Respondent. The Appellant filed a contestation in the Court below of a report of collocation by which Jane McKintosh was collocated for a sum of money in deduction of £2000 claimed her under the will of William McKintosh. The contestation of Appellant, on the point in question, was: "Que la "dite Jane McKintosh, au nom de laquelle l'opposition à fin de "conserver a été faite, n'a jamais demeuré dans le pays, et qu'elle "est décédée avant le décès de William McKintosh, son frère, "qui lui a légué la pension ou rente viagère de £50 par année, "réclamée en son nom, et pour laquelle rente ou pension via-"gère elle est colloquée par la huitième collocation." The death of the testator took place on the 16th February, 1842, and the opposition was filed on 6th September, 1859. In Appeal the authorities quoted below were cited on behalf of Appellant. (1) ROBERTSON, A., for Respondent, contended that the authorities were not applicable to a case like the present, but applied either to cases where parties came into Court claiming rights as being heirs or representatives of absentees who were dead, or were claimed to be dead, or to cases where a *rente viagère* properly so called was in question. That the claim of Jane McIntosh was not a *rente viagère*, but was an ordinary claim founded upon the will as opposant's title, and that to insist on opposant proving her existence would be a palpable violation of the maxim *ei incumbit probatio*, &c.

The following are the remarks of the chief-justice on the point referred to: "Il me reste à dire un mot de la question à laquelle le conseil de l'Appelante semble avoir attaché le plus d'importance, à qui *incumbit onus probandi* de la vie ou de la mort de la dite Jane McIntosh? Le créancier, qui se présente pour réclamer, ou au nom du quel on réclame des arrérages de rente, est-il tenu, lorsque son existence est déniée, de faire apparaître de cette existence? La lettre qui est produite comme ayant été adressée d'Ecosse à madame Reed de cette ville, datée du 13 octobre, 1859, ne prouve pas que Jane McIntosh soit encore vivante. Ayant été néanmoins produite de la part de l'Intimée, cela indiquerait que les avocats qui agissent en son nom, ont cru qu'ils étaient obligés de faire la preuve de son existence."

DUVAL, Justice: The only point decided in this case is that the burden of proving the existence of Jane McIntosh lay on her.

(1) 2 Pothier, *Tr. des rentes*, p. 97, n° 257; 1 *Journal du Palais*, p. 182, arrêt de 13 Février, 1572; arrêt de 1629; 1 *Journal des Audiences*, p. 177, arrêt de 1734; 7 *Journal des Audiences*, p. 282; 4 Locré, p. 278; 6 Pothier, *Des Successions*, p. 8; Lebrun, *Des Successions*. p. 2; Merlin, *Rép.* vbo. *Legitime*, sect. 3, § 1, chap. 59; Merlin, *Rép.*, vbo. *Rente viagère*, § 15; Merlin, vbo. *Vie*, § II, *Certificat de vie*, 1 et 3 col; *Code civil*, art. 135, 136, 1983; 1 Duranton, p. 456, n° 533; p. 459, n°s 535, 537; 4 Bosquet, *Explication du Code Civil*, p. 526; Démolombe, p. 223, n°s 200 to 204; Sirey, 1825, 1, 158.

MONDELET, Justice: Survivorship should have been proved by her.

JUDGMENT: Seeing that Appellant hath expressly put in issue the existence of Respondent at the time of the filing of her opposion, and the fact of her having survived the testator, and that the burden of proof lay upon her. Seeing that Respondent hath failed to make such proof, and that, therefore, in the judgment awarded to her in the court below, there is error, &c., &c. (1) (11 *D. T. B. C.*, p. 327,)

DORION, DORION and SENÉCAL, for Appellant.

HUGH TAYLOR, for Respondent.

VENTE.—CLAUSE RESOLUTOIRE.

SUPERIOR COURT, Quebec, 3rd December, 1860.

Before STUART, Justice.

EVANS, Plaintiff, *vs.* SMITH, Defendant.

En 1852, la Demanderesse et sa sœur vendirent au Défendeur certaine propriété à rente viagère, l'acte contenait un pacte commissoire par lequel il était stipulé que, si le Défendeur faisait défaut de payer la rente viagère, les vendeurs auraient droit de faire rescinder la vente, et de rentrer en possession de la propriété. En 1857, le Défendeur ayant fait défaut de payer la rente, et étant arriéré de huit quartiers, les parties à l'acte de 1852 en firent un autre par lequel le Défendeur rétrocéda à la Demanderesse et à sa sœur une certaine portion de la propriété vendue par l'acte de 1852.—Par l'acte de 1857, il était pourvu que les vendeurs conserveraient leur hypothèque et privilège de bailleur de fonds en vertu du dit acte de 1852, et que le Défendeur leur transporterait les loyers et revenus des propriétés qui lui restaient. En 1859, le Défendeur ayant de nouveau fait défaut de payer la rente viagère aux termes de l'acte de 1852, et la Demanderesse ayant porté son action en récision de l'acte de 1852, en vertu du pacte commissoire y contenu:

Jugé: Que le pacte commissoire ou clause contenue dans l'acte de 1852 avait cessé d'exister en raison de la transaction contenue dans l'acte de 1857.

STUART, Justice: On the 22nd January, 1852, Plaintiff, and her sister Jane Evans, made a sale to Defendant of two houses in the Uppper Town of Quebec, for an annuity or life rent of £425 a year, to diminish by one half upon the death of either

(1) In this case a point arose as to the amount of security to be given on the appeal instituted by Jane McIntosh to Her Majesty in her privy-Council. The clekr of the court had made out a bond with a justification for £3000. The parties were heard before Mr. Justice Aylwin, in Chambers, on the 12th April, 1861, who held that, as the sum for which Jane McIntosh was collocated in the Superior Court £1388 2 3 was still to be held in the sheriff's hands, that sum should not be taken into account, except as to what might accrue as interest thereon during the time the appeal might be pending, which interest he would fix at £150, and for ordinary costs of appeal £500, in all £650 cy; for which sum a bond with two sureties was given.

of the vendors, and to cease upon the death of both ; this deed contains the following covenant : " Provided always, and it " is hereby expressly covenanted and agreed by and between " the parties, that, should T. R. Smith, his heirs or assigns, fail " or make default in the punctual payment of the rent, at the " quartely terms, and at any time be two quarters in arrear " with the payment thereof, or should he or they fail " or make default in his obligation of maintaining and up- " holding the houses and premises in good order and repair " and to renew and rebuild the same when necessary, or should " he or they fail or make default in his obligation of insuring " the houses and premises, and of assigning and delivering up " the policies and renewal receipts thereof that then and " thereupon, in any of the aforesaid cases, should Julia Evans " and Jane Evans, or either of them, see fit or deem it expe- " dient, the present sale and conveyance shall become, be and " remain, null and void. And that, in any of the aforesaid " cases happening, Julia Evans and Jane Evans, or either of " them, are hereby authorised to take and prosecute all such " proceedings in law as may be necessary or proper, as well to " rescind, annul and *make void the present sale and con-* " *veyance*, as to be re-instated in the absolute title and pos- " session of the sold property, and to recover and have all " losses, damages, costs, expenses and interests suffered by " them in the premises." This deed received full execution. On the 22nd April, 1857, the same parties made another deed wherein, after reciting the first mentioned deed, and another of a like nature of the 10th February, 1852, by which another property was sold by Plaintiff and her sister to Defendant, for an annuity or life rent of £130 a year, and containing the same clause as the one above transcribed, and after reciting that Defendant was eight quarters in arrear of the annuities under both deeds, it was declared " that Julia Evans and Jane Evans *are unquestionably entitled forthwith to be reinstated in the absolute title and possession* of the property sold : " The deed then proceeds as follows : " And whereas, in order to avoid all further suits, contestations, and proceedings at law, costs and charges in the premises aforesaid, Smith, Julia and Jane Evans, for themselves and their respective heirs and assigns, have *transacted* and agreed as follows ; that Smith should and would *retrocede* and grant, with all warranties of law and right, unto Julia and Jane Evans, a certain part of the immoveable property therein-after specially described to be held by them in absolute property, and that, by reason thereof, the annuity or life-rent of £425, payable under and in virtue of the deed of sale of the 22nd January, 1852, should be and remain diminished and reduced

to the yearly sum of £212 10; that Smith, from and after the first day of May then next ensuing, should and would punctually pay to Julia and Jane Evans, quarterly, commencing on the 1st August next, the aforesaid reduced yearly annuity of £212,10,together with the entirety of the yearly annuity of £130, payable under deed of sale of the 10th February, 1852, forming together an entire annual sum of £342 10, he Smith, remaining acquitted and discharged of and from all arrears of the annuity or sum of £1100. *And, for securing the punctual payment of the yearly sum of £342 10, quartely, Julia and Jane Evans should and would retain and have their hypothec and privilege of bailleur de fonds, under and by virtue of the aforesaid deeds of sale and conveyance, respectively, and further that he Smith should and would assign, transfer and set over unto Julia and Jane Evans, all and every the rents, revenues, issues and profits of the remainder of the property.*" Not long after the execution of this deed, Jane Evans died. On the 4th August, 1859, the present action was brought by Plaintiff, alleging that, on the 1st August, there was due to her £132 16 3, being five quarters of the annuity, and setting forth the the covenant or *pacte commissoire* in the deed of the 22nd. January, 1852, and praying that that deed might be set aside, and likewise the deed of the 23rd. April, 1857, in so far as necessary, and that Plaintiff be reinstated in the property and possession of the undivided half of the immoveable mentioned in the deed of sale. The Defendant pleaded a *défense au fonds en droit*, which is now to be disposed of. The action is brought upon the *pacte commissoire* to be found in the deed of the 22nd. January, 1852. And, if that covenant subsists, uninfluenced by the retrocession of the 22nd April, 1857, the action must prevail. It becomes necessary to analyse this last mentioned deed, and understand its character, in order to measure its effect by a true legal standard. After reciting the essentials of the deed of the 22nd January, 1852, and particularly the covenant that the default on the part of Defendant to pay two quarters of the annuity should render void, the deed, and after reciting in the same manner the deed of the 10th. February, 1852, and alleging that eight quarters of the annuity under each deed were in arrear, it proceeds to lay down that Plaintiff and her sister, in consequence: " are unquestionably entitled forthwith to be re-instated in the absolute title and possession of the property sold by them." Here then is the fact stated that Defendant is in arrear, not two, but eight quarters of the annuity, and the legal consequence, as the parties understood it, that Plaintiff was unquestionably entitled forthwith to be re-instated in the absolute title and possession of the

property sold by her it is upon these facts, and this view of the law, as applicable to them, that the parties Plaintiff and Defendant, in order to avoid all further suits, contestations and proceedings at law, *transact* and agree that Defendant should *retrocede* one of the properties to Plaintiff, and that the annuity stipulated by the deed of sale of 1852, should for the future be reduced by one half, and the *retrocession* is thereby made; this deed contains a contract known to our law by the name of a *transaction*, and is to be favorably viewed. According to the parties, Plaintiff and her sister were unquestionably entitled to be re-instated in all the property they had sold to Defendant, but, in *lieu* of insisting upon all they were entitled to, they compromise their rights under the *pacte commissoire*, and accept a retrocession of one of the houses, and reduce the rent or annuity to £212 10 a year. The Plaintiff and her sister did not forget to secure the payment of the annuity then established for the future at £342 10, for they stipulate that they shall retain their hypothec and privilege of *bailleur de fonds* under the "aforesaid deeds of sale and conveyance," respectively, and further that Defendant should assign to them all and every the rents, revenues, issues and profits of the remainder of the property left to him; and they further stipulate that they shall continue to occupy one of the houses, at a rent to £50 a year, as long as they please. The modified annuity is thus expressly secured by the hypothec and privilege of vendor under the old deeds, and upon the new security of the assignment of the rents and issues of the property remaining to Defendant. This express stipulation cannot be set aside by the general words of style to be found at the conclusion of the deed, that there should be no novation of the original deeds, this can rationally be understood to mean nothing more than that Plaintiff's mortgage and privilege will date from the original deed, but cannot be interpreted to mean that the *pacte commissoire* contained in the original deeds should still be held to subsist after the *transaction* of the 22nd April, 1857. As, in my opinion, the covenant upon which the action is brought has ceased to exist since the passing of the compromise of April, 1857, I hold that the *défense au fonds en droit* of Defendant is well founded and that Plaintiff is without action against him of the nature of the one brought.

JUDGMENT: Considering that the demurrer or *défense en droit* filed by Defendant is well founded in law, and that Plaintiff hath no action upon the *pacte commissoire* contained in the deed of sale of the twenty-second day of January, 1852, the parties having compromised the same by the deed of the

twenty second day of April, 1857, doth dismiss Plaintiff's action. (11 *D. T. B. C.*, p. 337.)

ANDREWS and ANDREWS, for Plaintiff.

LELIÈVRE, for Defendant.

DOUAIRE COUTUMIER.

SUPERIOR COURT, Quebec, 3 December, 1860.

Before STUART, Justice.

ADAMS, Plaintiff, *vs.* O'CONNELL Defendant, and O'CONNELL, *ès qualité* Opposant.

Jugé: Qu'en vertu de la 37me sec. de la 4me Vict., ch. 30, le douaire des enfants se prend :

1° Sur les terres, propriétés etc., en la possession du père à l'époque de son décès ;

2° Sur les terres, propriétés etc., qui ont été dans la possession du père, et par rapport auxquelles la mère n'a pas déchargé ou éteint son douaire, en vertu des dispositions de la 35me section du statut ci-dessus cité. (1)

STUART, Justice: The Defendant, in his quality of tutor, files an opposition *à fin de conserver*, on behalf of his minor children and alleges that the property sold is liable towards the minors for the *douaire coutumier*, he likewise sets up a claim to £125. The Opposant concludes for the payment of the £125, out of the proceeds of the sale, and also that they be collocated: "en vertu du droit des mineurs au douaire cou-"tumier à eux appartenant, laquelle collocation sera faite "suivant la loi." The opposition therefore seeks to secure their rights of dower, and also the payment of a sum of £125, alleged to be due to them as heirs of their deceased mother. To this opposition Plaintiff filed a *défense au fonds en droit* which the court is called to adjudicate upon, the principal grounds are: 1° That there is no allegation of the death of the father of Defendant; 2° that it is not alleged that Defendant was seized of the property sold at the time of his decease; 3° that it is not alleged that the mother had not barred her dower. The question raised is upon the interpretation to be put upon the 37th sec. of 4th Vict., chap. 30. By the 35th sec. of this law, married women are permitted to join with their husbands in the alienation of lands which may be liable for their legal or customary dower, and to release such dower, up to the time of the passing of the 4th Vict., chap. 30, married women could not bar their dower. The 37th sec. indicates the property which thenceforward will be liable to the children

(1) Con. statutes, chap. 37, secs. 52-53, et art. 1441 et 1443 C. C.

for the legal or customary dower," the legal or customary dower, and the right to legal and customary dower of the child &c., shall be had and exercised, solely and exclusively, upon and in respect *of lands, tenements, real or immoveable estates, subject to the dower of his*, her or their *mother*, whereof his, or her father *was seized and possessed at the time of his death*, and *also* upon and in respect of those on which the dower and right of dower of his, her or their mother, *may not have been by her released or barred, during the continuance of her marriage*, and *not* upon any *other lands and tenements*, real or immoveable estates whatsoever, any law &c." This clause merely confirms the disposition of the 35th section by stating that the children's dower shall attach to the property in the possession of the husband at the time of his decease, and also upon such as the mother may not have barred and released her dower, and upon no other, this is merely excluding from the operation of the dower such property as may have been released by the mother under the authority she derives from the 35th clause, in other particulars the law stands as it stood before. The *défense au fonds en droit*, in this view of the case, is not founded in law, and must be dismissed." Considering that the reasons assigned by Plaintiff in support of his *défense au fonds en droit* are insufficient in law to support the same." (11 *D. T. B. C.*, p. 344.)

CAMPBELL and KERR, for Plaintiff.

BOSSÉ and BOSSÉ, for Opposant.

SHERIF.—DEPENS.—TRANSACTION.

QUEEN'S BENCH, APPEAL SIDE, Montréal, 7 mars 1861.

Before SIR L. H. LAFONTAINE, Bart., Chief-Justice, AYLWIN, DUVAL, MEREDITH and MONDELET, Justices.

QUENTIN DIT DUBOIS, Appellant, *and* BOSTON, Respondent.

Dans une action en revendication, le shérif saisit certains meubles dans la possession du Défendeur, lesquels meubles furent, sur requête du Demandeur, avant le rapport du writ, vendu par le shérif, et le produit d'iceux, £208 18 5, rapporté en cour. Partie de cette somme fut payée par ordre de la cour à un intervenant, comme créancier privilégié du Défendeur, et la balance, £84 2 7, resta entre les mains du shérif. Subséquemment, les parties à l'action transigèrent par devant notaires. Par la transaction, le Demandeur s'obligea de retirer son action, et toutes matières en litige entre les parties furent finalement réglées. Sur ce, jugement fut rendu mettant les parties hors de cour, sans frais. Le Défendeur porta alors son action contre le shériff pour la somme de £84 2 7, et le shérif rapporta en cour et déposa £9 19 11, qu'il offrit au Demandeur comme la balance des argents entre ses mains, après déduction de ses frais et déboursés, tant sur l'exécution du writ de revendication, que sur la vente des meubles.

Jugé: 1° Que le shérif avait droit de déduire tous frais nécessaires encourus par lui sur la vente des effets.

2° Que les parties ayant basé leur transaction sur le rapport du shérif, et ne l'ayant pas contesté, le rapport devait être maintenu, et les parties étant convenues que le Demandeur retirerait son action, chaque partie payant ses frais, le saisi transportant tous droits qu'il pouvait avoir au saisissant, il, le saisi, ne pouvait par après, comme Demandeur, recouvrer du shérif plus que la somme offerte.

Il semble, que la question de savoir si le shérif avait, ou n'avait pas, un droit de gage ou de retention sur les effets saisis et revendiqués, lorsque l'action est renvoyée, ne devait pas être considérée comme décidée sur l'appel

In the Superior Court, Montréal, SMITH, Justice : This is an action brought against the sheriff of this district to recover the value of certain moveables seized by writ of *saisie-revendication* upon Plaintiff, Dubois, who was Defendant in a case brought against him by Desjardins. The moveables were sold under order of the Court, and part of the proceeds were distributed in the same way as if the monies were levied under a writ of execution. The parties then settled their difference by a notarial transaction or *compromis,* Desjardins thereby agreeing to withdraw his action, each party to pay his own costs, and Dubois then cedes and transfers all his right in the property to Desjardins. This *compromis* being produced, by Defendant, Dubois, in this case *en revendication*, a judgment was rendered putting the parties *hors de cour*, each paying his own costs. Dubois then turns round and brings his action against the sheriff, demanding the whole of the monies left in his hands, without regard being had to the costs incurred either on the writ of *revendication*, or by the sale of the goods under order of the Court. As to the costs of sale, the sherif uniformly retains them in case of sales on execution, and in this case, he was justified in doing so. As to the costs on the writ of *revendication*, the parties had adopted the report of the sherif, they had filed no contestation of it at least, and under the circumstances, he did not see that the sheriff could be turned over to his recourse against the *saisissant* after such a settlement, and without any decision as to the party really entitled to the goods. " Considering that Plaintiff hath failed to establish any right in law to have or maintain the conclusions by him taken in his action ; and considering further, that Defendant hath established his right in law to deduct from the proceeds of the sale of the goods and chattels ordered to be sold by the interlocutory order of the 3rd day of August, 1856, all the necessary expenses incurred by him, in effecting the sale of the goods and chattels, in virtue of said order, and according to its provisions ; and, further, considering that Defendant hath fully established, by legal and sufficient evidence, that there is now in his hands, a balance only of the

said sum £9 19 11, arising out of the proceeds of the sale under the process of *revendication*, and all the proceedings had thereon ; and further, considering that Plaintiff hath failed to establish in law a right to claim any greater or further sum, than the sum of £9 19 11 ; and further, considering that Defendant hath tendered to Plaintiff the sum of £9 19 11 by his plea, and hath deposited, *consigné en justice*, said sum. The Court doth condemn Defendant to pay Plaintiff the sum of £9 19 11 with interest, &c., and costs, and doth condemn Plaintiff to pay all costs accrued from and after the date of the filing of the plea, and the deposit." The following is the judgment of the 18th June, 1857, rendered upon production of the deed of the 9th of May, 1857 : " The Court inasmuch " as it appears, by the deed executed on the 9th May, 1857, " before Martin and colleague, and produced with the motion, " that the parties *ont pris arrangement*, and that Plaintiff " had undertaken to withdraw his suit, grants *acte* to Defen- " dant of the production of the said deed, and in consequence, " *met les parties hors de cour sans frais*." In appeal, it was urged on behalf of Appellant: That, inasmuch as all privileges were matter of exception to the common rule of law, the *onus* of proving the right of *retention* or lien contended for by the sheriff, fell upon Respondent; that, as to the costs of sale of the goods, Appellant would not have brought the case into appeal ; but that that part of the judgment giving the sheriff a lien for the costs of the proceedings under the writ of *revendication* could not be maintained. On behalf of Respondent it was submitted : 1° That the sheriff, as the public officer performing a duty imposed by law, has a lien upon the property seized for his fees and disbursements ; 2° that the sheriff's right of lien extends to the property under seizure, even where *main levée* thereof has been ordered ; 3° that the remedy to Defendant is an action of damages against Plaintiff for the illegal seizure, and a part of those damages would be the amount paid to the sheriff before the property was released ; 4° that, in the event of the property under seizure having been lost, the sheriff would be liable and obliged to indemnify Defendant directly or indirectly ; 5° that the sheriff performed certain duties, such as selling and levying, which would entitle him to retain the fees and disbursements ; 6° that the compromise between Plaintiff and Desjardins was a sale of the property under seizure to present Plaintiff, for a valuable consideration, and could not be made so as to disturb the rights of the sheriff.

MONDELET, Justice, dissenting, said, in effect, that the questions which presented themselves for decision were two : 1st. Has the sheriff, as a public officer, a lien upon the property

seized for his costs and disbursements ? 2nd. Does such lien or privilege attach to the property seized, even after *main-levée* of the seizure has been granted ? Admitting the affirmative on the first point, and that, in certain cases, and so long as the effects seized are in the hands of justice, the second question as it presents itself in this case, cannot be affected, inasmuch as there was in effect *main-levée* granted in favor of Defendant below, now Appellant, who thereby not only takes back his property, but has in his favor an acknowledgment that it ought not to have been seized. So that the second question must be answered in favor of Appellant. He thought the sheriff could not invoke the arrangement between the parties of the 9th May, 1857. He was no party to it, and no right or advantage could result to him from it. The mutual discharges given by the parties to that arrangement, and the declarations made as to costs concerned themselves only, and not the sheriff; and this might be the reason why the counsel of the parties did not allude to it, considering it, probably, as having no bearing on the case. If apart from the considerations of law, which, in the view of the learned judge justified the opinion that the effect of *main-levée* was in favor of the *saisi*, considerations of equity or arguments *ab inconvenienti* were invoked, it would be seen, that amongst other results from maintaining an opposite principle, it would follow that it would be sufficient to revendicate the effects of any person whomsoever, and that the seizure were irregular and null, to give the sheriff a right to retain the effects, or the monies arising from the sale of a part of them. So that the more a Defendant was harrassed by bad proceedings, the more would the sheriff gain, and the more interest would he, or his deputies, have in making such seizures, for the oftener they were made, the more would Defendant have to pay, by the retention of the effects seized, or by the exercise of the privilege sought to be enforced by the sheriff on the monies arising from a sale which, in this case, was not the act of Defendant, but of the court at the instance of Plaintiff. He was of opinion, therefore, that the judgment ought to be reversed, and judgment rendered in favor of Appellant.

DUVAL, Justice: Could not agree in the judgment about to be rendered. He held the sheriff liable to Defendant in the case now submitted for decision. The authorities quoted from Pothier, *Depot*, No 92, and 11 Dalloz, p. 660, were against the sheriff instead of being in his favor. A question might be raised as to whether the form of recourse should not have been by rule on the sheriff, instead of the more expensive recourse by action; but, in his opinion, the arrangement or transaction between Plaintiff and Defendant in the court below in the

original case, could not be held as a waiver of recourse against the sheriff, or as an *acquiescement* in the proceedings adopted by the seizing party. He held that the *transaction* showed that Desjardins had backed out of his seizure, an l agreed to pay his own costs. Dubois had nothing to do with this; he did not employ the sheriff to make the seizure, nor did he agree to pay Desjardins for persecuting him. The agreement did not take the case out of the general rule that, if Plaintiff loses his action of revendication, Defendant has a right to get his property back. As to the hardship of the case urged on behalf of the sheriff, he could not see any hardship in it. He had the right to apply to the court and get an order on the Plaintiff for costs of guardianship, and, if not paid, to have the seizure discharged. If, instead of doing this, he trusted to Plaintiff, the hardship would be greater in obliging a Defendant to pay the costs of a seizure made against his will, and which the seizing party had abandoned.

MEREDITH, Justice: I concur with the learned Chief-Justice in thinking that the judgment of the Court below ought to be confirmed. In the present case, after the writ of *saisie revendication* had been duly executed, after a considerable portion of the goods seized had been sold, and after the greater part of the proceeds of the sale had been paid away, in obedience to an order of the Court, the parties made a settlement, which does not impugn, or question, in any way, the legality of the sale of the goods already mentioned. On the contrary, the settlement appears to me to be in effect, a tacit admission of the legality of that sale; and, if that sale was legal, then the Sheriff according to my view, was entitled to deduct from the proceeds of the sale. all his fees and disbursements, as well of the seizure, which was a preliminary step to the sale, as of the sale itself. In a word I regard the deed of compromise as being virtually an acquiescence on the part of present Appellant, in the previous proceedings on the part of Respondent, as sheriff; who, therefore, has a privilege on the proceeds of the sale of the effects, for the amount of his fees and disbursements. As to the amount of those fees and disbursements, I think the certificate or statement of the public officer is to be presumed correct, at least, until it be specially impugned. I do not lose sight of the stipulation in the deed of *compromise*, that Plaintiff, in the former case, Desjardins, was to pay his own costs; but that stipulation cannot be understood as extending to fees and disbursements liquidated by a sale previously made, and which sale was, as already mentioned, in effect confirmed by the *acte d'arrangement*. Considering, as we must, the sale so made as valid, the balance really in the hands of the sheriff was the difference between the gross proceeds of the

sale, and the amount he had paid away in obedience to the order of the Court, together with his own fees and disbursements. Those fees and disbursements were in effect liquidated by the monies which came into the hands of the sheriff, upon the occasion of the sale, and, therefore, cannot be deemed to have been contemplated as part of the costs undertaken to be paid by Plaintiff in the former case.

SIR L. H. LAFONTAINE, Bart., Juge-en-Chef: En 1856, bref de saisie revendication, à la poursuite de Desjardins, ordonnant au shérif (l'Intimé) de saisir des marchandises etc., qui étaient alors en la possession de l'Appelant. La saisie fut faite par le Shérif. Avant le jour du rapport en cour du bref de saisie, il fut ordonné au Shérif par le juge, sur la requête de Desjardins, de procéder à la vente des effets ainsi saisis; la vente produisit £208 18 5, sur laquelle somme il fut payé à une partie intervenante, par ordre de la Cour, celle de £116 15, 10, ce qui laissa entre les mains du Shérif £84 2 7. Le 18 juin, 1857, les parties dans l'instance sur la saisie revendication furent mises hors de Cour, ayant pris des arrangements, est-il dit dans le jugement. L'Appelant demandait, en conséquence, par son action, que le Défendeur (le Shérif) fût condamné à lui payer la somme de £84 2 7, avec intérêt du 18 juin, 1857. Les frais du Shérif, tant sur la saisie que sur la vente, se sont montés selon son rapport, à £81 3 1, savoir £67 18 11 sur la saisie, et £13 4 2, frais de la vente. Le shérif, après avoir relaté les faits, dit qu'il n'a plus entre les mains que £9 19 11, qu'il offre et dépose au greffe. L'acte d'arrangement, intervenu entre Desjardins et Dubois, et par suite duquel ils furent mis hors de cour, est du 9 mai 1857, et a été produit par le shérif. Il contient la clause suivante, dont, chose assez étrange, les parties ne nous ont pas dit un mot à l'audience: " Et aux charges et conditions ci-dessus et des " autres parts exprimées, les dites parties se donnent réciproquement quittance finale de toutes demandes, réclamations " et prétentions pour dommages ou à quelqu'autres titres que " ce soit, que chacune d'elles peut avoir, demander et prétendre l'une contre l'autre, au regard des dites poursuites, " saisies-arrêts, saisies-revendication, et pour quelqu'autres " causes et raisons que ce puisse être, s'en désistant à toutes " fins que de droit." La saisie, la vente, le rapport du shérif, lequel rapport contient en la manière suivie jusqu'ici, un état de ses frais, tout cela a eu lieu avant l'acte d'arrangement intervenu entre les parties. Dans le fait, le shérif rend compte, par son rapport, de la somme qu'il a prélevée, cependant on lui demande par l'action de rendre compte, et puis, sans lui donner crédit pour aucune partie de ses frais, pas même pour ceux que la vente a entraînés, on conclut contre lui au paie-

ment de la susdite somme de £84 2 7. Je ne crois pas que ce soit là la demande qui aurait dû être formulée. Le shérif, en faisant la saisie et la vente, n'a fait que se conformer aux ordres de la cour. Si son état de frais est trop élevé, ou erroné il me semble que Dubois aurait dû l'attaquer spécialement, et démontrer en quoi cet état était ainsi trop élevé ou erroné, ou forcer le shérif à justifier cet état. Il n'en a rien fait. Si, comme le prétend Dubois, il a droit de répéter du shérif ce qu'il peut rester entre ses mains de la somme prélevée, sans lui tenir aucun compte de ses frais, le shérif devrait avoir son recours contre Desjardins. Cependant, par l'acte d'arrangement, Dubois a libéré Desjardins des conséquences de la saisie, et, par conséquent, des frais que cette saisie avait occasionnés. Desjardins ne pourrait-il pas opposer avec succès cette libération à une action récursoire de la part du shérif ? Dubois ne s'est-il pas, par cela même, chargé des frais du shérif, en supposant que précédemment à l'acte d'arrangement, il n'en pût être tenu ?

AYLWIN, Justice : Stated in effect that the case has been argued on the abstract principle of whether the sheriff had a lien for his costs on all the property seized. This question did not present itself here. There was here in effect, a writ of execution and sale of property. Part of the proceeds went to pay a privileged creditor of Defendant ; the goods were treated as Defendant's goods, his debt was paid by the sale of the goods made for his benefit, and the sheriff makes his return in the usual way, which return is not contested. After this, a distribution was made by order of the court, the sheriff pays over the monies distributed, and the balance, after deducting the fees and costs he offers to Appellant. In this the sheriff was right. Judgment confirmed. (11 *D. T. B. C.*, p. 367.)

LAFRENAYE and PAPIN, for Appellant.

STUART, for Respondent.

USUFRUIT.—RÉPARATIONS.—IMPENSES.

COUR SUPÉRIEURE, Québec, 4 septembre 1861.

Présent : TASCHEREAU, Juge.

LAFONTAINE *vs.* SUZOR *et al.*

Jugé : 1° Que, dans l'espèce, l'usufruitier ne peut répéter du propriétaire que les grosses réparations et les réparations nécessaires pour la conservation et l'exploitation des immeubles sujets à l'usufruit.

2° L'usufruitier ne peut réclamer les impenses utiles que jusqu'à concurrence de ce que les immeubles s'en trouvent être de plus grande valeur au moment de l'ouverture de la substitution.

3° Les impenses grosses et nécessaires sont remboursables en entier, quand bien même elles n'existeraient plus au moment de l'ouverture de la substitution, pourvu que l'usufruitier ne soit pas coupable de leur disparution par suite de son manque d'entretien.

4° Les impenses voluptuaires ne sont pas remboursables. (1)

PER CURIAM : Le Demandeur, tant en son propre et privé nom, comme ayant été commun en biens avec Adèle Berthelot son épouse, que comme son légataire universel et son exécuteur testamentaire, réclame des Défendeurs, tuteurs conjoints des enfants mineurs issus du mariage de Amable Berthelot (que je désignerai sous le nom de, le fils, pour le distinguer de son père portant le même nom) et de Marie Joséphine Zoé Desrochers, les enfants comme seuls légataires universels de feu Amable Berthelot, père, leur aïeul, une somme de £570 16 6, pour valeur de certaines réparations faites par le Demandeur et son épouse à deux maisons dont l'usufruit de l'une fut donné par feu Amable Berthelot père, à la dite dame LaFontaine lors de son mariage avec le Demandeur, en juillet 1851, et l'autre léguée à la même dame par le même Amable Berthelot père, par son testament en date du 20 novembre 1844, à la condition expresse, exprimée dans le contrat de mariage, que la propriété de ces deux maisons appartiendrait aux enfants de la dite dame en légitime mariage, et en cas de son décès, sans enfants, la propriété retournerait au dit Amable Berthelot père, et s'il était décédé au moment de la mort de madame LaFontaine, la propriété retomberait dans sa succession ou suivrait ses dispositions testamentaires, et à la condition, exprimée au testament, que la propriété de l'autre maison appartiendrait aux enfants de madame LaFontaine, à naître de son mariage avec le Demandeur, et dans le cas que madame LaFontaine mourrait sans enfants, alors la propriété de la maison en dernier lieu mentionnée, irait à Amable Berthelot, le jeune, son fils, en usufruit seulement, et la propriété à ses enfants. Les enfants du dit Amable Berthelot le fils,

(1) V. art 468 C. C.

sont admis être actuellement propriétaires des deux maisons, par suite de ce que madame LaFontaine est décédée en mai 1859, sans enfants. Les Défendeurs plaident à la demande: 1° Que les impenses faites par le Demandeur et feue son épouse, pendant leur possession des maisons, ne sont que de simples réparations ou impenses d'entretien, et à la charge de leur jouissance. 2° Ils ont nié que le Demandeur et son épouse aient fait aucune grosse réparation. 3° Que lorsque le Demandeur et son épouse ont pris possession de ces maisons, elles étaient en bon état et ne nécessitaient pas de réparations. 4° Que les grosses réparations réclamées par le Demandeur, ont été faites par le Demandeur, du vivant de feu A. Berthelot père, leur donateur, et pour leur commodité et avantage. 5° Qu'il n'y avait pas de nécessité de reconstruire, en 1839, l'une de ces maisons, que les impenses faites en conséquence par le Demandeur et son épouse n'étaient pas nécessaires mais simplement utiles, et conséquemment non remboursables. 6° Qu'à l'expiration de l'usufruit par la mort de madame LaFontaine, le 27 mai 1859, les deux maisons furent laissées par le Demandeur en un mauvais état, nécessitant de grandes réparations, et que le Demandeur ne pouvait répéter contre les Défendeurs, la valeur entière de leurs réparations nécessaires, mais seulement leur valeur au moment de la cessation de l'usufruit. Il s'élève en cette cause des questions de fait et de droit sur l'étendue du recours du Demandeur, sur son droit de réclamer, non-seulement les grosses réparations, mais même les réparations utiles, et la plus ou moindre valeur de ces dernières réparations, eu égard à l'époque où les Défendeurs sont censés en jouir. Les principes sur lesquels je dois décider la cause actuelle sont ceux-ci, savoir: 1° Le Demandeur ne peut réclamer en entier que les grosses réparations et les réparations nécessaires pour la conservation et l'exploitation des immeubles. 2° Il ne peut réclamer des impenses utiles, et qui auraient même augmenté la valeur de la propriété, que jusqu'à concurrence de ce que les maisons s'en trouvent être de plus grande valeur au moment de l'ouverture de la substitution. 3° Les impenses grosses et nécessaires doivent être remboursées en entier, quand bien même elles n'existeraient plus au moment de l'ouverture de la substitution, pourvu que le Demandeur ne soit pas coupable de leur disparition par défaut d'entretien. 4° Les impenses voluptuaires ne doivent pas être remboursées. L'enquête faite démontre qu'une de ces maisons, qui est celle connue sous le nom de la maison de madame Todd, et bâtie sur l'immeuble désigné en premier lieu en la déclaration en cette cause, fut donnée en usufruit à madame LaFontaine, en son contrat de mariage avec le Demandeur, comme on l'a déjà vu, que cette maison, à cette époque était

une très-ancienne maison, qui avait déjà été incendiée, réparée à faux frais sans en reconstruire les murs, et habitée telle que telle jusqu'en 1839, époque à laquelle son état de délabrement était devenu tel qu'il était impossible de l'habiter, et qu'il était devenu nécessaire de la reconstruire presqu'en entier, aussi voit-on que par un marché en date du 29 octobre 1839, entre H. S. Huot, comme procureur du Demandeur, et Isaac Dorion et M. L. Petitclerc, il fut convenu que ces deux personnes feraient à cette maison des travaux équivalant à une reconstruction, à l'exception des murs et de la couverture qui, cependant, fut refaite à neuf, lorsqu'après l'avoir visitée on se fut aperçu qu'elle ne valait rien. Le coût de ces premières réparations fut stipulé être de £200 pour la menuiserie, et en ajoutant les ouvrages additionnels et jugés nécessaires pour la réparation de cette maison, le tout se monta à £253 18 9 courant, pour coût des premières réparations faites à la dite maison No. 1 par le menuisier Isaac Dorion, je considère ces réparations nécessaires ou grosses réparations du caractère de celles dont le propriétaire doit tenir compte à l'usufruitier. Je suis donc d'opinion que, quant à cette somme, elle doit être répétée par le Demandeur des Défendeurs ès qualités. Il y a aussi les réparations de maçonnerie qui ont le même caractère de réparations indispensables, et doivent être allouées au Demandeur, 1° au montant de £75, premier prix du marché susdit, 2° au montant de £53 10 9, pour ouvrages additionnels (extras) faits à la dite maison No. 1, lors de sa reconstruction comme susdit ; sur le montant du compte du Demandeur pour ces extras, j'ai retranché plusieurs items non prouvés, et l'item de £15 pour un poêle qui doit être considéré, ou comme meuble, ou comme impense voluptuaire. Il doit aussi être accordé au Demandeur, une autre somme de £91 5 6½, que le Demandeur a prouvé à ma satisfaction avoir dépensée sur les maisons en question, par des ouvrages faits depuis la reconstruction de la maison, qui, sans être nécessaires, sont d'une grande utilité, et resteront aux propriétaires, et aussi pour l'introduction de l'eau et du gaz dans ces maisons, pour la construction des canaux, pour la valeur de grilles. Il n'est pas prouvé que ces derniers ouvrages soient en ce moment détériorés pour m'autoriser à les réduire à leur valeur actuelle comme étant celle à laquelle les Défendeurs sont tenus d'indemniser le Demandeur, d'après le principe que j'ai énoncé plus haut. Cependant, comme ces ouvrages doivent avoir subi, depuis les quelques années qu'ils sont faits, une diminution de valeur, j'ai pris sur moi de déterminer cette diminution que j'établis à 20 par 100, et cela dans le but d'éviter aux parties le trouble et les dépenses d'une expertise. Néanmoins, on verra par mon jugement que je laisse aux parties le choix de demander à cet

égard une expertise, qui pourrait peut-être être plus favorable à l'une ou l'autre. Le Demandeur doit aussi être remboursé en outre de £5 10, pour coût de la confection entière d'une couverture. Cette déduction de 20 par 100 réduit donc à £78 10 2½ la valeur que je crois pouvoir accorder au Demandeur sur les impenses faites à la propriété de ces maisons depuis la reconstruction de l'une d'elles en 1839. J'ai rejeté comme non recouvrable des Défendeurs les items de réparations utiles, il est vrai, mais que je considère être des réparations de simple entretien, et à la charge de l'usufruitier, savoir : £8 1 payé aux nommés Vézina et Gaboury, pour réparations à un hangard et autres choses de la maison No. 1 en 1850; de £9 11 11 payé au nommé Ls. Darveau, pour réparation en 1850, à la maison No. 2 ; £2 19 4 à Ignace Dorval, pour réparations en 1855, ces derniers ouvrages faits à la maison No. 2 : £8 0 0 au nommé Gouge, pour réparer la couverture de la maison en 1855 ; £7 10 0 au nommé Allaire, pour avoir peint une partie de maison de 1857 ; £6 3 11, au nommé Poitras, pour ouvrages faits comme réparations à la maison en 1856 : £5 7 8½ payés au nommé Gaboury, pour réparation à une couverture en 1857. J'ai retranché des £30 payés à M. Shaw, tous les items excepté le coût de la grille et du gaz, les considérant comme réparations d'entretien, tandis que la grille et le gaz sont des ouvrages permanents, et qui serviront aux propriétaires. Le total formé des divers montants susdits s'élève à la somme de £460 19 1, pour laquelle il y a jugement contre les Défendeurs, ès qualités, et les reprenants l'instance, avec intérêt de l'assignation, et les dépens. (11 *D. T. B. C.*, p. 388.)

FOURNIER et GLEASON, pour le Demandeur.

LÉGARÉ et MALOUIN, pour les Défendeurs.

ASSURANCE.—ARBITRAGE.

COUR SUPÉRIEURE, Québec, 4 septembre, 1861.

Présent TASCHEREAU, Juge.

ALLEYN *vs.* LA COMPAGNIE D'ASSURANCE DE QUÉBEC.

Jugé : 1° Que le propriétaire d'une maison incendiée et assurée à une compagnie qui s'est réservé le droit de rebâtir, peut insister strictement sur la clause contenue en la Police d'assurance, que les ouvrages seront vus et visités par experts, et que, tant que la Compagnie d'Assurance ne se sera pas conformée à cette condition, même pour des ouvrages peu considérables, le propriétaire n'est pas tenu de recevoir sa maison en cet état, et peut poursuivre la Compagnie d'Assurance pour l'obliger à

lui rendre la possession d'icelle en l'état où elle doit être, et après l'observation de la condition d'une expertise.

2° Que le fait que le propriéraire, pendant la reconstruction aurait fait à l'ouvrier des suggestions sur la manière de reconstruire, ou sur la division des appartements, ne peut être interprété contre lui comme une renonciation à son droit d'une expertise.

PER CURIAM : Le Demandeur, par sa déclaration, se plaint que les Défendeurs refusent de lui rendre la possession de sa maison et dépendances, situées rue Haldimand, en la cité de Québec, qui ont été assurées au bureau des Défendeurs pour £900, en 1859, et incendiées en février, 1860. Il allègue que les Défendeurs, faisant usage du privilège que leur accordait la police d'assurance, ont jugé à propos de rebâtir la maison, au lieu de payer le montant de l'assurance ; que les Défendeurs ont, de fait, rebâti la maison et dépendances, mais ne se sont pas acquittés de la chose de manière à satisfaire le Demandeur, et aussi de rebâtir d'une manière convenable et en bon ouvrier, et à dire d'experts, en toute diligence, ont manqué à ces conditions, nonobstant que, dès le 25 octobre, 1860, ils aient de fait terminé l'ouvrage et aient notifié le Demandeur que les ouvrages étaient complets, et l'aient sommé d'accepter sa maison et de les décharger de tout recours en raison des ouvrages. Le Demandeur se plaint, de plus, que les Défendeurs veulent l'obliger à accepter ces ouvrages sans qu'ils aient été vus et visités par des experts, conformément à une des condition de la police d'assurance, et que, de cette manière, le Demandeur ne peut accepter sa maison, et qu'il réclame des dommages au montant de £400, résultant de ce qu'il ne peut louer la maison, ne peut l'assurer contre le feu, etc. Et il conclut à ce que, sous tel délai, la cour ordonne que les Défendeurs soient condamnés à lui rendre et restituer la possession de la maison et dépendances, et, de plus, que les Défendeurs soient condamnés à lui payer les £400 de dommages ci-dessus mentionnés, avec intérêt et dépens. Les Défendeurs ont plaidé qu'ils avaient fait rebâtir cette maison et ses dépendances par Louis Amiot, ouvrier, en vertu d'un marché, que Louis Amiot s'était bien acquitté de son devoir, et de manière à donner pleine et entière satisfaction au Demandeur, qui avait lui-même, en compagnie de membres de sa famille, vu et visité les ouvrages, les avait approuvés, et avait fait des suggestions auxquelles l'ouvrier s'était conformé, que plusieurs ouvrages additionnels avaient été faits à la bâtisse, lesquels, les Défendeurs n'étaient pas tenus de faire, et que la reconstruction de la maison donnait à la propriété du Demandeur une valeur de £200 au-delà de celle qu'elle avait avant sa destruction par le feu ; que les Défendeurs ayant notifié le Demandeur par protêt du 25 octobre 1860, que les ouvrages étaient complétés, et le Demandeur leur ayant signifié son intention

de faire examiner les ouvrages par des experts, cette visite eût lieu vers le 6 novembre, et que l'ouvrage fut trouvé recevable, que, néanmoins, le Demandeur donna une liste des ouvrages à faire ou à compléter, que ces ouvrages furent faits et complétés, et que la clef de la bâtisse avait été offerte au Demandeur vers le 16 novembre 1860, et que le Demandeur l'avait refusée. De plus, il fut plaidé par les Défendeurs que le Demandeur était en possession de la maison par ses locataires. Le Demandeur a répondu spécialement à ce plaidoyer des Défendeurs. Les points principaux de cette réplique, sont que les changements qui ont eu lieu dans la bâtisse ont été faits du consentement de l'ouvrier, et comme l'équivalent d'autres ouvrages qu'il devait faire, mais qu'ils n'obligeaient pas l'ouvrier à de plus grands frais ; qu'en réalité, le Demandeur, avait, lors de la visite du 6 octobre, 1860, donné une liste des ouvrages qu'il désirait voir exécuter, mais que cette liste ne fût donnée qu'avec la réserve, en faveur du Demandeur, contre les Défendeurs, de son recours pour tout autre défaut qui pourrait se découvrir y compris les vieux murs, que les Défendeurs ont voulu le forcer à accepter tous les ouvrages, sans lui donner occasion de contredire l'ouvrage, de le faire examiner par experts, et l'obliger à les décharger complètement de tout recours de sa part contre eux, à l'égard de l'exécution de l'ouvrage, etc. Le point principal de la cause consiste dans la question de savoir si le Demandeur, en visitant l'ouvrage à mesure qu'il avançait, en faisant des suggestions à l'ouvrier sur la manière de faire les distributions des chambres, et lui faisant faire d'autres ouvrages au lieu de ceux qu'il était tenu de faire, et en donnant la liste des ouvrages qu'il entendait faire faire ou corriger à la suite de l'espèce de visite ou expertise qui eut lieu le 6 octobre 1860, et lesquels ouvrages sont prouvés avoir été faits, si, dis-je, le Défendeur a renoncé à ses droits de faire examiner les derniers ouvrages par des experts, conformément à la condition de la police d'assurance, et s'il pouvait être obligé par les Défendeurs à leur donner, en recevant les ouvrages, une décharge de toute réclamation ou demande relativement à la police d'assurance, tel que les Défendeurs l'exigent par leur protêt du 25 octobre 1860. Je n'entends pas soulever de question quant au fait de savoir si le Demandeur a pris possession de la maison en la louant à Wood, qui est prouvé l'avoir occupée depuis la fin de novembre 1860 ; car il est clairement prouvé que le Demandeur n'a pas voulu consentir à ce que Wood prît possession de la maison, et que Wood en est en possession d'une manière, qu'en loi, je puis qualifier de voie de fait. Il n'y a pas de doute que les conventions des parties doivent être exécutées, et strictement interprétées par les tribunaux, devant lesquels les parties

jugent à propos de porter les difficultés qui surgissent entre elles à propos de l'interprétation de leurs conventions. Dans la présente cause, les Défendeurs ont jugé à propos de rebâtir la maison et dépendances dont il s'agit, au lieu de payer au Demandeur les £900 qu'ils avaient promis lui payer comme l'équivalant de la valeur de sa maison en cas d'incendie. Ils sont censés avoir fidèlement apprécié la valeur de cette maison au montant de £900, puisqu'ils ont le soin, jusqu'au dernier moment, de lui faire payer une prime d'assurance sur le pied de £900. Ils avaient droit de rebâtir la maison, conformément à une des conditions de la police d'assurance, mais ils étaient strictement tenus de tous les accessoires de cette condition, ils devaient, entre autres choses, rebâtir à dire d'experts. On voit que Louis Amiot a reconstruit la maison pour £670, et le hangard pour £40, et que, dès le 6 octobre 1860, les parties se sont rencontrées avec des experts pour visiter et recevoir les ouvrages. Il y fut fait une espèce de visite dont les détails et les circonstances n'apparaissent dans aucun rapport d'experts, mais il appert par le témoignage en la cause, que Archer et McKay, de la part du Demandeur, et Dorion, de la part des Défendeurs, agirent pour les parties, et que, dans le cours de la visite, Riverin, secrétaire de l'assurance, proposa au Demande lui donner une liste des ouvrages auxquels le Demandeur trouvait à redire, et de ceux à faire, ce qui fut fait, et là se borna la visite et la prétendue expertise plaidée par les Défendeurs. Plus tard, les ouvrages spécifiés dans la liste fournie par le Demandeur, furent faits, si j'en crois Louis Amiot, et je suis disposé à dire qu'ils ont été faits. Le 25 octobre 1860 les Défendeurs notifièrent le Demandeur que les ouvrages étaient finis, le sommant de recevoir la clef et de prendre possession de sa maison, à la condition de leur donner une décharge pleine et entière de toute réclamation à l'égard de la police d'assurance. A cette sommation le Demandeur a répliqué qu'il acceptait la clef de la maison, se réservant tout recours qu'il pourrait avoir contre les Défendeurs, et à la charge d'une visite et examen immédiat par des personnes compétentes et non autrement On ne voit pas qu'à la suite de cette réponse les Défendeurs aient consenti à faire visiter les ouvrages par experts ou à faire connaître au Demandeur qu'ils renonçassent à la demande qu'ils lui faisaient, par leur protêt, d'une décharge pleine et entière de toute réclamation de sa part à l'égard de la police d'assurance. Au contraire, on voit que le Demandeur, par un protêt du 30 octobre, 1860, notifia aux Défendeurs son intention de tenir les Défendeurs responsables des dommages à raison de leur injuste refus de lui livrer la maison. Il est vrai qu'il y a une certaine contradiction entre les témoins relativement à l'époque à laquelle eut lieu la rencontre de McKay,

Archer et Dorion, mais par la date de liste de M. Alleyn, contenant l'état des ouvrages qu'il désirait faire faire, on voit que c'est le 6 octobre, et non le 6 novembre, que cette visite a eu lieu ; d'ailleurs Amiot jure positivement que cette visite a eu lieu le 6 octobre. Les Défendeurs, suivant moi, n'ont pas le droit de faire accepter les ouvrages par le Demandeur, à moins qu'ils n'aient été visités et reçus par experts. Inutile de dire qu'ils ont été approuvés par le Demandeur pendant leur exécution, cette visite et cette approbation apparente n'auraient pour effet que de faire voir que le Demandeur désirait surveiller la distribution des appartements de sa maison, et désirait exercer le droit qu'il avait de voir que les ouvrages fussent bien faits au meilleur de sa connaissance et pour sa plus grande utilité, mais, comme le Demandeur n'est pas prouvé être un homme de l'art dans la construction de maisons, je ne puis considérer sa conduite en cette occasion comme une approbation de la qualité et de la suffisance des ouvrages, et comme une renonciation au droit qu'il avait de faire constater par experts la qualité de l'ouvrage. Mais, supposons que l'on puisse interpréter le fait de donner une liste des ouvrages à faire comme une approbation de l'efficacité de tous les autres, et comme une renonciation au droit de les faire examiner par experts, il reste toujours la même difficulté pour les ouvrages mentionnés en la liste, qui n'ont jamais été approuvés ni reçus par des experts. La conduite des défendeurs est assez singulière jusque là, mais si l'on ajoute que, par leur protêt, ils veulent faire renoncer le Demandeur à tout recours en dommages à l'égard de cette police, leur conduite et leurs prétentions deviennent absurdes à un haut degré. Les Défendeurs sont donc dans le tort, et leur conduite est injustifiable, suivant moi, ils sont donc encore en possession de la maison du Demandeur, ils l'étaient à l'époque de l'institution de l'action, et sont, par conséquent, passibles des dommages que le Demandeur a soufferts. Ces dommages sont la perte des loyers du Demandeur depuis le 15 octobre jusqu'à ce jour, s'élevant à £109 7 6, pour laquelle somme il y aura jugement contre les Défendeurs, condamnant, de plus, les Défendeurs à livrer au Demandeur la possession de la maison et dépendances en question, dans l'état où ils sont tenus de la livrer, après visite et examen par experts, et ce sous quinze jours de la signification de la présente sentence ; si non, et à défaut par les Défendeurs de se conformer à la présente sentence, il sera permis au Demandeur de s'en mettre en possession, au moyen d'un bref de cette cour adressé au shérif de ce district. Réservant au Demandeur son recours pour dommage à compter de ce jour, qui peuvent lui résulter du refus des Défendeurs de livrer au Demandeur la maison et dépendances en temps opportun, et

dans l'état où elle doit l'être en conformité à la police d'assurance, le tout avec intérêt et dépens. (11 *D. T. B. C.*, p. 394,)

ALLEYN, pour le Demandeur.

STUART and MURPHY, pour les Défendeurs.

DECRET.—DEFAUT DE CONTENANCE.

SUPERIOR COURT, Quebec, 4th February, 1861.

Before STUART, Justice.

QUEBEC BUILDING SOCIETY, Plaintiffs, *vs.* JONES et al, Defendants, *and* DIVERS, Opposants.

Jugé: Qu'un adjudicataire réclamant une réduction de son prix d'adjudication, en raison d'un défaut de contenance, doit procéder par voie de requête et non par voie d'opposition ; et il doit donner avis de ses procédures à toutes les parties dans la cause. (1)

STUART, Justice: The Plaintiffs file an *opposition à fin de conserver*, alleging that, on the 4th April, 1860, they became purchasers, at the sale in the present cause of a certain water lot of which they give the description at length (which description after mentioning bound declares the contents of the lot to be 9560 feet) for the sum of £275 ; that they have had the lot measured since their purchase of it, and that it contains 5972 feet, shewing a deficiency of 3587 feet, for which they are entitled to a diminution of price to the extent of £103 3 11, and concluding to be collocated in preference to all other creditors, by privilege, for the sum of £103 3 11, upon the price of the lot. R. Jones, a mortgage creditor of Defendant, contests this claim of Plaintiffs by means of a perpetual exception, to which Plaintiffs reply specially, and he also files, a *défense au fonds en droit* to the opposition, there is likewise a *défense au fonds en droit*, to the special answers. The hearing in the present cause is upon both *défense au fonds en droit*. To commence with the *défense au fonds en droit* to the opposition of Plaintiffs. For the purposes of the present argument, it must be taken as admitted that the deficiency of contents alleged in the opposition of Plaintiffs exists, then the following questions are submitted : 1° Whether the property sold was not described by certain known boundaries, and as a thing certain, or whether it was described as containing a given quantity ; 2° Whether opposants being also Plaintiffs are not *garants* of the description of the property in question ; and whether they are admissible to complain of their own act, and entitled to be relieved from its

(1) V. art. 1501 C. C.

consequences; 3° Whether the claim of the adjudicataire for a diminution of the price can be urged by an *opposition à fin de conserver*, as done in the present instance. The view taken by the court upon the last of these questions renders it unnecessary to enter upon the consideration of the other two. As too often occurs in our law there is singularly little to be found in the authors of a purely practical kind upon a question that must so frequently occur as that of an application by a purchaser for a diminution of price, and the court is driven to refer to general principles to guide it upon the decision of a point that should be one of practice well established. The leading authority upon this subject is to be found in 2 Henrys, p. 551, the judgment there given *in extenso* upon an application by an *adjudicataire* for diminution of price, "*La Cour faisant droit sur les requêtes et demandes*," and shewing the proceeding there to have been by petition, the court entertains no doubt that that is the true and only course, the question to be decided presents itself for the first time; the practice of filling oppositions is of comparatively recent date, and, in no instance, was there any objection taken to that course. It is obvious that all the parties in the cause ought to be notified by the *adjudicataire* that he is desirous of having a diminution of his price, and there is nothing to prevent his asking to be refunded such diminution out of his own monies; in the case in Henrys the court ordered a given amount to be paid to the Petitioner out of the monies paid by him. The opposition is a remedy given to the creditor of Defendant and confined to him; by filling such an opposition, the creditor sanctions the sale and cannot afterwards be admitted to contest it, it therefore cannot be the remedy of a person whose object it is to modify the sale. In this case, the Quebec Building Society is permitted by the judgment to recommence their proceedings for a diminution of the price, if they should be advised to do so. (11 *D. T. B. C.*, p. 430.)

TESSIER and Rose for Building Society.

STUART and MURPHY, for R. Jones.

Authorities: 2 Henrys, p. 551, et seq.; 1 *Rep. Jur.*, p. 160, vbo. *Adjudicataire*; *Dic. de Dr.*, vbo. *Adjudicataire*. p. 44; 1 Pigeau, p. 238; Pothier, *Vente*, n° 258; Pothier. *Pro. Civ.*, p. 250 et seq. and p. 233.

SOCIETE.—CONFESSION DE JUGEMENT.

SUPERIOR COURT, Quebec, 4 February, 1861.

Before STUART, Justice.

THE CANADA LEAD MINE COMPANY, Plaintiffs, *vs.* WALKER, *et al.*, Defendants, and STEIVEN, Opposant.

Jugé: Qu'un associé, après dissolution, ne peut confesser jugement sur une action portée contre la ci-devant société, et que jugement rendu sur telle confession sera mis de côté sur opposition afin d'annuler.

Il semble: Que, dans le cas même où la société eût encore subsisté, il est douteux qu'un associé puisse donner une confession de jugement pour les deux.

STUART, Justice: The Defendants had been copartners as plumbers at Quebec, from the 1st September, 1855, to 1st September, 1860, under articles of partnership produced in the cause. On the 12th September, 1860, Plaintiffs issued a writ of summons against Defendants as partners, alleged to be carrying on business under the name of John Walker & Co., to appear in this Court on the 24th September. The declaration set forth a promissory note of Defendants in favor of Plaintiffs for $560, over due. On the 12th of September, Messrs Prendergast & Panet filed an appearance for Defendants in the prothonotary's office. On the same day, a confession of judgment, in the following words, was likewise filed in the prothonotary's office, which the Plaintiffs forthwith accepted: "The Defendants in this cause confess judgment, jointly and "severally, in favor of the Plaintiffs, for the sum of $560, "with interest and costs. "Quebec, 12th September, 1860." "JOHN WALKER & CO., per JOHN WALKER. PRENDERGAST & "PANET, for the Defendants." On the 15th September, three days after the issuing and service of the writ of summons, and nine days before the return day, the prothonotary entered up a judgment against Defendants, jointly and severally, upon the confession of judgment filed. On the 15th of September, the day of the rendering of the judgment, a præcipe for a writ of *fieri facias* was fyled by Plaintiffs, accompanied by a consent signed "John Walker & Co.," and countersigned by Prendergast & Panet, that execution should issue, and execution issued against Defendants. John Steiven, one of Defendants, filed an *opposition à fin d'annuler*, praying that the judgment rendered, and all the proceedings had thereupon, might be set aside and declared null; because the partnership between Defendants had expired before the issuing of the writ, and no service of the same had been effected upon him; because he had never authorized Prendergast & Panet to appear for him; because he had not signed nor authorised any

body to sign for him a confession of judgment; and because Plaintiffs were aware of the dissolution of the copartnership between Defendants. He likewise filed a petition *en désaveu* of Prendergast & Panet. The Opposant has been permitted to proceed *exparte* upon both proceedings. The articles of copartnership produced by Steiven shew that, by effluxion of time, the partnership between him and Walker was dissolved on the 1st September. No copy of the writ was served upon Steiven, but there was a personal service of it upon Walker, and, on the same day, the appearance for both Defendants and the confession of judgment were filed. The judgment complained of was rendered by the prothonotary; that officer derives his power to render judgment in *exparte* cases from 23 Vic., c. 5, section 11; 23 Vic., chap. 57, sections 43, 44, 45, 46, 47, 48, and, upon confessions from, 12 Vic., chap. 38, sections 83, 84. It has not been made a question whether the prothonotary could enter up a judgment before the return day of the writ, and the Court will not express any opinion on that point. The rule of law seems to be well established that a partner has no implied authority, except so far as is necessary to carry on the business of the firm. Thence it has been decided that a partner cannot bind the firm by a submission to arbitration. Even therefore if the partnership had subsisted, it may very well be doubted whether Walker could confess judgment in the way he did for both, but, under the circumstances, no doubt can exist that the whole of the proceedings are null and must be set aside, with costs against Plaintiffs. Prendergast and Panet seem to have been too confiding in Walker and they have found themselves without a defence of any kind when their professional conduct is called in question by Steiven. There must be judgment upon the petition *en désaveu*, awarding the conclusions taken by it, with costs against Messrs. Prendergast and Panet. (11 *D. T. B. C.*, p. 433.)

TALBOT, for Plaintiffs.

PRENDERGAST and PANET, for Defendants.

CASAULT and LANGLOIS, for Steiven.

CORPORATION MUNICIPALE.—REGLEMENT.

SUPERIOR COURT, Québec, 4 mars 1861.

Before TASCHEREAU, Justice.

Exparte, DALLIMORE, Petitioner on writ of *Certiorari*.

Jugé : Que la corporation de la cité de Québec ne peut faire de règlement pour imposer une taxe pour l'eau dans aucun des quartiers de la cité, avant qu'elle ne soit prête à fournir aux résidents de tel quartier, un approvisionnement régulier d'eau pure et salubre.

Dallimore, was proceeded against in the Recorder's Court by the mayor, councillors and citizens of the cité of Quebec, who claimed from him $66.40 for his water taxes for the years 1856 to 1859; to this claim, petitioner pleaded that Plaintiffs had never, during the period mentioned in their accounts, supplied his house with water, so as to become entitled to the payment of the water rate; and that Plaintiffs had never been ready, during the same period, nor were they then, to supply the house with water in such quantities and with such regularity as to entitle them to claim the water rate from him. Upon this issue the following judgment was rendered. "Considérant qu'il a été constaté que, depuis le "trente avril 1857, jusqu'au trente avril 1860, le Défendeur a "reçu chaque jour, sauf les accidents, des Demandeurs, un ap-"provisionnement régulier d'eau, dans ses maisons mention-"nées aux comptes, pendant l'espace de deux heures, savoir: "depuis cinq heures, jusqu'à sept heures P. M. Considérant, "que depuis le premier mai 1856, jusqu'au trente avril 1860, "le Défendeur n'a fait aucune plainte aux autorités com-"pétentes de son approvisionnement d'eau, condamne le Dé-"fendeur à payer aux Demandeurs, la somme de soixante "et six piastres et quarante cents." The Petitioner submitted this judgment to the revision of the Superior Court, under the writ of *certiorari*, and, in support of his petition, he urged, among others, the following reasons: Because the law regulating the water works in Quebec states positively that the water rate will not become payable before the water is ready to be supplied, and because the law itself qualifies the supply of water in the following words "*a continued and abundant supply* of pure and wholesome water;" Because it appears clearly on the face of the judgment itself of which the petitioner complains, that the supply of water by the water works to petitioner far from being *a continued and abundant supply*, as required by law, did not last more than two hours every day; Because the water was not supplied to petitioner by the water-works in such manner and in such

quantities as required by law, in order to make the water rate payable, and because the supply was quite insufficient for the wants of petitioner; Because the by-law of the corporation of Quebec upon which the action of the mayor, the councillors and the citizens of the city of Quebec is based, is null, in so far as petitioner is concerned; because, when the corporation made the by-law, it was not ready and prepared to supply that part of the city in which the petitioner's houses are situated with water, nor has it ever since been ready so to do.

Joly, pour le requérant: Le requérant, Dallimore, a été poursuivi devant le Recorder, par la corporation, pour le paiement de la taxe de l'eau, pour sa maison située dans la rue Ste. Geneviève, sur le Cap, pendant 4 ans. Il a plaidé paiement pour la première année, du 1er mai, 1856 au 30 avril, 1857, et, de plus, que l'approvisionnement d'eau etait insuffisant pendant les trois dernières années, depuis le 30 avril, 1857, au 30 avril, 1860, qu'il n'était pas continuel et abondant aux termes du statut, et que le règlement en vertu duqnel la corporation cherchait à prélever cette taxe etait nul et illégal. Le recorder a décidé que le paiement de la taxe pour la première année n'avait pas été prouvé. et, par le jugement, le Défendeur est condamné à payer le capital demandé avec intérêt et les dépens. Quand à la première partie du jugement relativement à l'année commençant au 1er mai, 1856, et finissant le 30 avril, 1857, le Requérant ne s'en plaint pas, car il n'a pas réussi à prouver le paiement, mais il ne croit pas que cela puisse empêcher que le jugement du Recorder ne soit renversé en entier. Paley, on *Convictions*, Part. 3, cap. 3, sec. 5, dit: " It seems to " be understood that a conviction cannot be quashed in part " and stand good as to the rest, but must be quashed generally." Un *certiorari* n'est pas la même chose qu'un appel. Maintenant, abordons la partie vitale de cette cause. Le jugement du Recorder dit que, vû qu'il a été constaté que le Requérant a reçu un approvisionnement régulier d'eau pendant l'espace de deux heures par jour, savoir, depuis cinq heures jusqu'à sept heures du soir, le Requérant doit payer la taxe, et il est condamné en conséquence. Quel est l'approvisionnement que la corporation est tenue de fournir au Requérant pour pouvoir lui faire payer la taxe? Si le Requérant peut établir que ce n'est pas un approvisionnement de deux heures seulement par jour, il devient évident que le Recorder a excédé ses pouvoirs en le condamnant, et que, par conséquent, le jugement doit être mis de côté. La 18 Vic. cap. 30, sec. 2, dit: Qu'il sera loisible à la Corporation, aussitôt qu'elle sera prête à fournir de l'eau à la cité ou à aucune partie d'icelle, de spécifier et déclarer par un règlement que les propriétaires de maisons dans la cité, ou telle partie d'icelle dans laquelle elle est prête à fournir de l'eau,

seront soumis à la taxe ou cotisation annuelle, laquelle taxe ou cotisation ne sera pas payable cependant avant que la coropration ne soit prête à fournir de l'eau aux propriétaires ou occupants. La 16ème Vict. cap. 129, sec. 2, fait usage des mêmes termes. Le requérant soutient que la corporation n'est pas prête à fournir de l'eau aux propriétaires et occupants de maisons dans la partie de la cité dans laquelle se trouve située la maison du requérant, et qu'elle n'était pas prête à le faire lorsqu'elle a passé le règlement sur lequel la présente action est basée, que, par conséquent, la taxe n'est pas payable, et de plus, que le règlement est illégal et sans force. Il s'agit maintenant d'établir comment l'eau doit être fournie par la corporation pour lui donner le droit de faire payer la taxe. Nous trouvons, dans la version anglaise de la 10 Vic. (1846) cap. 113, sec. 11, l'approvisionnement d'eau décrit comme suit: " a continued and abundant supply of pure and wholesome " water." La version française remplace le mot " continued " par celui de régulier, mais comme ce statut a été rédigé d'abord en anglais, et ensuite traduit en français, nous devons adopter pour son interprétation la rédaction en anglais. La corporation en fournissant l'eau pendant deux heures par jour, donne-t-elle un approvisionnement continuel et abondant ? Il n'y a qu'à lire le préambule du statut, pour voir quelle était l'intention de la législature ; elle a voulu assurer aux citoyens de Québec un approvisionnement plus abondant et à meilleur marché que celui qu'ils recevaient des porteurs d'eau et surtout un approvisionnement continuel en cas d'incendie, ce dernier cas est spécialement prévu par le statut. Les incendies n'éclatent pas toujours entre cinq et sept heures du soir. Mais il serait futile de prolonger cette discussion, il est évident qu'un approvisionnement de deux heures par jour n'est ni continuel ni abondant. Il y a encore un autre point de vue sous lequel l'on doit envisager cette question. La corporation n'allègue pas un contrat, dans lequel le consentement des deux parties produit l'obligation, c'est le montant d'une taxe qu'elle réclame ; c'est la loi seule qui produit l'obligation que la Corporation dit avoir été contractée par le requérant. (1) Il faut donc suivre la loi rigoureusement, puisqu'elle est la source de l'obligation du requérant, si cette obligation existe. La loi qui impose au propriétaire l'obligation de payer la taxe de l'eau dit aussi que cette taxe ne sera pas payable avant que la corporation ne soit prête à fournir l'eau. Il y a là une conditon suspensive, et qui plus est, une condition *indivisible*, comme le sont les conditions suspensives. Pothier, *Obligations*, n° 215 dit : " L'accomplissement des conditions est indivisible,

(1) Pothier, *Obligations*. n° 144.

" même quand ce qui fait l'objet de la condition est quelque " chose de divisible." La corporation ne peut donc pas réclamer du requérant le montant de la taxe avant de lui avoir fourni *en entier*, l'aprovisionnement auquel il a droit ; tant que l'approvisionnement n'est pas complet, la taxe n'est pas plus exigible que s'il n'avait pas été fourni une seule goutte d'eau. Que la corporation fournisse l'eau au requérant, ainsi qu'elle est tenue de le faire avant que de pouvoir réclamer la taxe, et le requérant paiera cette taxe.

BAILLARGÉ, pour la Corporation : " Le jugement rendu en faveur de la Corporation en Cour Inférieure est fondé sur ce que les mots *approvisionnement régulier et abondant* contenus dans la version française de la 10 Vic., Chap. 113, sec. 11, ne signifient pas et ne veulent pas dire que la Corporation sera tenue de fournir de l'eau aux citoyens de Québec d'heure en heure, et de minute en minute, et jour et nuit sans discontinuation aucune, mais seulement qu'elle sera tenue de fournir l'eau *régulièrement* tous les jours à des heures fixes, et en quantité suffisante pour les besoins de la famille du requérant. L'eau a été fournie au requérant *régulièrement* tous les jours à des heures fixes, et en quantité abondante et plus que suffisante pour les besoins de la famille du réquérant, et partant le jugement du Recorder doit être confirmé.

" Considérant, que, par les divers statuts de cette province permettant à la Corporation du maire et des conseillers et citoyens de la cité de Québec, de prélever sur cette cité, en aucun quartier d'icelle, une taxe pour la fourniture de l'eau, et notamment par le statut passé dans la dixième année du règne de Sa Majesté la Reine Victoria, chapitre 113, intitulé acte pour approvisionner d'eau la cité de Québec et ses environs, il est ordonné que la Corporation devra faire des règlements pour assurer à la cité de Québec un approvisionnement d'eau abondant et continuel, et que la Corporation ne pourra faire de règlement pour prélever aucune taxe pour l'eau, avant que la Corporation ne soit en position de fournir cette eau, d'une manière abondante et continue, à la cité, ou à aucun de ses quartiers : Considérant que la sentence du Recorder de cette cité, en date du neuf juillet 1860, condamnant le requérant, Samuel Dallimore, à payer à la Corporation la somme de $66.40, pour la taxe de l'eau, constate que Samuel Dallimore n'a eu un approvisionnement d'eau que pendant deux heures par jour, depuis le trente avril 1857, jusqu'au trente avril 1860, et qu'en cela la dite sentence est fautive en ce que la Corporation ne pouvait soumettre la cité de Québec, ou aucun de ses quartiers, à une taxe de l'eau à moins d'être en position de la ou de les approvisionner d'eau en la manière susdite, et ne pouvait exiger de Dallimore la taxe de l'eau :

Considérant que la sentence est fondée sur un règlement illégal, et est, en conséquence, contraire à la loi, et que le Recorder en la rendant a outrepassé sa juridiction : Considérant que la sentence ne peut être modifiée par cette cour, et, qu'au contraire, elle doit être déclarée mauvaise et illégale en son entier, malgré que pour une partie elle serait fondée en loi ; la cour casse et annulle la sentence dont se plaint Dallimore, rendue par le Recorder de cette cité de Québec le neuf juillet dernier. (11 *D. T. B. C.*, p. 436.)

JOLY, for Petitioner.

BAILLARGÉ, for Corporation.

CAPIAS CONTRE UN COMMERCANT QUI REFUSE DE FAIRE CESSION.

COUR SUPÉRIEURE, Québec, 4 octobre 1861.

Présent : STUART, Juge.

HAMEL, *et al.*, *vs.* COTÉ, *et al.*

Jugé : Que dans un affidavit pour un writ de *capias ad respondendum* contre un commerçant, il est nécessaire d'alléguer, 1° l'insolvabilité du du Débiteur, 2° que tel Débiteur, étant insolvable, refuse de faire cession de ses biens en faveur et pour l'avantage de ses créanciers. (1)

Cette action fut commencée le 14e jour de septembre 1861, par l'émanation d'un writ de *capias ad respondendum*, dirigé contre Côté seulement, l'un des Défendeurs. Ce writ fut émané sur l'affidavit de Joseph Hamel, un des Demandeurs ; cet affidavit, après avoir énoncé les causes pour lesquelles les Défendeurs étaient endettés envers les Demandeurs, procède comme suit : " Que le déposant a raison de croire, et croit véritablement, que les Défendeurs ont caché leurs biens et effets avec l'intention de frauder les Demandeurs, et leurs autres créanciers, et que, sans le bénéfice d'un writ de *capias ad respondendum*, pour arrêter la personne de Majorique Côté, l'un d'eux, les Demandeurs perdront leur recours, et souffriront des dommages ; que les raisons qu'a le déposant de croire ainsi sont, que le 12 avril dernier, la société des Défendeurs, et le Défendeur Majorique Côté, étaient insolvables et en déconfiture ; que, le 14 août dernier, Majorique Côté, étant alors à Québec, a offert aux Demandeurs une cession de ses biens pour leur avantage, et celui des autres créanciers de la société de Majorique Côté, mais qu'avant la perfection de la cession, Côté a laissé Québec, s'est rendu à Rimouski, et a continué le commerce de la société Majorique Côté ; que la société a tout

(1) V. art. 799 C. P. C.

dernièrement fait des transports à quelques uns de ses créanciers, qu'elle a payé vingt chelins dans le louis à d'autres, et qu'elle a appliqué des argents provenant du commerce de la société, à faire des constructions sur une propriété propre de la femme de Côté, et que Côté a enlevé une bâtisse construite sur une propriété hypothéquée en faveur des Demandeurs." Sur rapport de l'action, il fut fait motion, de la part de Côté, pour que le capias émané contre lui fût annulé, et Côté mis en liberté, parce que l'insolvabilité des Défendeurs, telle qu'alléguée par les Demandeurs dans l'affidavit de Joseph Hamel, n'était pas seule suffisante pour obtenir l'émanation du bref de capias, sans l'affirmation de leur part que malgré la dite insolvabilité les Défendeurs refusaient de faire cession de leurs biens et effets pour l'avantage de leurs créanciers ; parce qu'il n'appert nullement par le dit affidavit que les Défendeurs aient, en aucun temps, refusé de payer les Demandeurs, ou de leur faire une cession de leurs biens et effets.

STUART, Juge : Dans cette cause, les Demandeurs ont, par l'affidavit de Joseph Hamel produit avec le præcipe pour le capias, allégué que les raisons qu'a le déposant de croire que les Défendeurs ont caché leurs biens et effets dans l'intention de frauder les Demandeurs, sont que la société des Défendeurs, faisant commerce sous le nom de Majorique Côté, et Majorique Côté, étaient insolvables et en déconfiture, et que Côté, étant à Québec, avait offert aux Demandeurs une cession de ses biens pour leur avantage, et celui des autres créanciers des Défendeurs, mais qu'il avait laissé Québec pour Rimouski sans faire acte de la cession offerte. Le Défendeur Côté a fait motion pour faire mettre de côté le capias, prétendant que l'allégation d'insolvabilité seulement était insuffisante pour justifier l'émanation d'un capias ; qu'il était de plus nécessaire d'alléguer que, nonobstant leur insolvabilité notable, Côté avait refusé de faire cession de ses biens et effets pour l'avantage des Demandeurs, et autres créanciers, ce que les Demandeurs n'ont pas allégué dans leur affidavit. Ces prétentions des Défendeurs sont bien fondées, parce que les Demandeurs ne disent pas que les Défendeurs ont refusé de faire cession, mais bien au contraire, que Côté, étant à Québec, a offert de le faire mais a laissé Québec pour Rimouski avant de faire telle cession.

JUGEMENT : La cour, pour les causes et raisons mentionnées en la dite motion ; accorde la motion, et ordonne que Majorique Côté soit mis en liberté, tel que demandé, avec dépens. (11 *D. T. B. C.*, p. 446.)

CASAULT et LANGLOIS, pour les Demandeurs.

LÉGARÉ et MALOUIN, pour les Défendeurs.

CONTRAT DU SHERIF.—SES EFFETS.

BANC DE LA REINE, EN APPEL, Québec, 8 mai, 1861.

Présents : Sir L. H. LAFONTAINE, Bart., Juge-en-Chef, AYLWIN, DUVAL, MEREDITH et MONDELET, Juges.

LATERRIÈRE, Appelant, *et* HOUDE et al., Intimés.

Jugé: 1° Que le titre accordé à un adjudicataire sur vente par décret, à une époque subséquente à l'adjudication, a un effet rétroactif, et confère à tel adjudicataire le droit de propriété et tous les avantages qui en résultent, à compter du jour de l'adjudication. (1)

2° Que, dans l'espèce, il y avait preuve suffisante de l'usage et occupation par l'Intimée de la propriété adjugée à l'Appelant.

Sir L. H. LAFONTAINE, Brt., Juge-en-Chef : Action pour loyer, à raison de l'occupation, par la Défenderesse, femme séparée de biens, d'une propriété dont le Demandeur s'était, le 30 mai, 1859, rendu adjudicataire au décret pratiqué sur le mari de la Défenderesse. Le mari étant devenu insolvable, sa femme obtint un jugement en séparation de biens, en 1858. Le décret avait été poursuivi par le présent Demandeur, qui, étant créancier privilégié, avait fourni caution suivant la loi, et, plus tard, il obtint titre du shérif. Ainsi, sous tous les rapports, son titre d'acquisition doit être censé valoir comme au 30 mai, 1859. Dans sa déclaration, le Demandeur allégue que la Défenderesse a occupé, du 30 mai au 1er septembre, 1858, et que la valeur du loyer pour cet espace de temps est de £30. C'est la somme qu'il demande par ses conclusions. Une défense au fond en droit, présentée par la Défenderesse, ayant été déboutée, le Demandeur a procédé à l'enquête *exparte*. Puis est intervenu, le 21 août, 1860, le jugement dont est appel ; il déboute le Demandeur de son action, " considering," est-il dit, " that Defendant, Mrs. Verret, denies upon oath that she occupied Plaintiff's house during the time for which she is sued in the present cause, and that the rest of the testimony in the cause speaks of Alexis Verret as occupying the same." Y a-t-il là une appréciation exacte de la preuve ? Je ne le crois pas. Dans le mois de janvier, 1859, le fonds de commerce, les outils, les matériaux et les voitures de Verret, (qui s'appelle Ambroise, et non Alexis,) avaient été vendus judiciairement, et achetés par la Défenderesse, en sa qualité de femme séparée de biens. Interrogée sur faits et articles, au 3e interrogatoire : " N'est-il pas vrai que Ambroise Verret a continué, après la vente judiciaire, à exercer son métier et industrie de carossier sur la propriété et dépendances, et ce, au nom et pour le profit et avantage de Theotiste Houde, comme séparée de biens d'avec

(1) V. art. 689 et 706 C. P. C.

lui, et ce, à sa connaissance et de son consentement ?" la Défenderesse répond : " jusqu'au 31 de mai de l'année dernière " (1859) ; et dans sa réponse au 4e interrogatoire, elle dit : " Mais, depuis cette époque, je ne sais au nom de qui il l'a exercé, ni au profit de qui, et je ne sais même pas s'il s'est servi de *mes* matériaux *qui étaient dans la maison.*" *Question,* 5° " N'est-il pas vrai que Théotiste Houde a occupé et fait occuper la propriété pour les fins de son commerce et pour le dépôt de ses voitures, outils et matériaux, depuis le mois de janvier de l'année dernière. jusqu'au premier de septembre dernier ; si non, dites pendant quel temps et quand ses voitures, matériaux et outils ont été totalement enlevés de dessus la propriété ? " *Réponse.* " Les effets ont été enlevés le dix du mois d'août dernier. Je ne puis dire s'il y avait alors des voitures dans la maison, mais il y avait encore des outils et des matériaux m'appartenant. " La réponse de la Défenderesse au 4e interrogatoire n'était pas sincère. Quand au 5e, elle évite de répondre à la première partie ; ainsi cette partie doit être prise pour confessée et avérée, et, par conséquent, fait preuve complète contre elle au profit du Demandeur, jointe à cela sa réponse à la 2e partie de l'interrogation. Elle a de plus expressément admis que jusqu'au 31 mai, tout allait en son nom, et deux témoins, Gingras et Mathieu, déclarent " qu'il n'y a pas eu de différence dans la manière que se sont faites les affaires de charron sur la propriété avant et après le 31 mai dernier. " S'il n'y a pas eu de différence connue, avant le 31 mai, les affaires se faisaient au nom de la Défenderesse, et cela de son propre aveu, il faut dire qu'après le 31 mai, les affaires ont continué d'être conduites en son nom. Enfin, tout bien considéré, il me semble établi que la Défenderesse qui était séparée de biens d'avec son mari a eu, en son propre nom, comme telle, possession des lieux jusqu'au 10 ou 15 août, 1859. Regardant la valeur du loyer comme étant de £30 par année, je donnerais jugement au second pour £15 11 1 courant, (2 mois et 10 jours de loyer, du 31 mai au 10 août 1859.)

MONDELET, Juge : Action par le propriétaire, pour occupation par la Défenderesse, séparée de biens de son mari, d'une maison appartenant à l'Appelant. Défense en droit (mal fondée) ayant été déboutée, et les Défendeurs n'ayant pas plaidé à l'action, le Demandeur a procédé *exparte.* Par la preuve et par les réponses aux interrogatoires sur faits et articles de la Défenderesse, (surtout son refus ou son abstention plutôt de répondre à la 1ère partie du 5e interrogatoire) la preuve du fait est complète. Ainsi je ne vois aucune difficulté ; le jugement de la Cour de 1ère instance doit être infirmé, et il doit y avoir jugement en faveur de l'Appelant pour £30. L'on a prétendu que l'identité de la propriété décrite dans le titre du

Demandeur avec celle décrite en la déclaration n'est pas établie. Cette objection, à mon avis, serait insurmontable si la Défenderesse elle-même n'avait pas, par ses réponses aux interrogatoires sur faits et articles, mis cette identité hors de tout doute.

JUGEMENT: "Considérant que le Demandeur, Appelant, s'est, le 30 mai, 1859, rendu adjudicataire au décret pratiqué sur le mari de la Défenderesse, Intimée, de la propriété dont il s'agit en cette cause, qu'ayant fourni caution, suivant la loi, et ensuite obtenu titre du Shérif, ce titre doit être censé valoir comme du 30 mai, 1859. Considérant qu'il est établi en fait que la Défenderesse Intimée a eu l'occupation de la propriété pour son propre profit, depuis le 30 mai, 1859, jusqu'au 10ème jour d'août suivant, et que, dans le jugement dont est appel, qui énonce le contraire, il a été fait une appréciation inexacte de la preuve, et que, par conséquent, il y a eu mal jugé; infirme le jugement rendu le 21e jour d'avril, 1860, par la Cour de Circuit, et cette Cour condamne la Défenderesse intimée, à payer à l'Appelant la somme de £15 11 1 avec intérêts, etc. (11 *D. T. B. C.*, p. 449.)

CASAULT et LANGLOIS, pour l'Appelant.

LARUE, pour l'Intimée.

RIVE NORD DU SAINT-LAURENT POSSEDEE PAR LES COMMISSAIRES DU HAVRE DE QUEBEC.

SUPERIOR COURT, Quebec, 8th July, 1861.

Before STUART, J.

Exparte, LANE, Petitioner for *Certiorari.*

Jugé : Que les grèves de la rive nord du fleuve St. Laurent sont maintenant possédées par les Commissaires du Havre de Québec et qu'ils ont seuls le contrôle et l'administration de ces grèves, comme aussi le droit de punir toute personne qui empiète sur, ou embarrasse les dites grèves, et que l'acte de la maison de la Trinité en autant qu'il conférait aucun pouvoir de contrôle et d'administration sur ces grèves, est rappelé par implication. (1)

This was a writ of *certiorari* to remove the proceedings had before the Trinity-House of Quebec, where a judgment had been rendered on the 30th of November, 1860, condemning Defendant to pay a fine of £10 and costs of suit. The charge against Lane was for having infringed the 41st By-Law of the Trinity-House. The defence set up was: 1° that the Trinity-House had no jurisdiction; 2° that the offence com-

(1) V. S. du Can. de 1875, 38 Vic., ch. 55, sec. 1 et 2

plained of had been already tried, *chose jugée ;* 3° that Defendant had not encumbered the passage in the manner complained of, and that he occupied the premises under lease from the provincial government ; which lease, as well as a plan of the premises, was filed by Defendant. It was proved by Plaintiff that the offence charged against Defendant had been committed, and, as no evidence to the contrary was produced, judgment was rendered against Lane. It was argued before the Superior Court on behalf of Defendant, that the Trinity-House of Quebec had ceased to have jurisdiction in the premises, that the 22 Vict., cap. 32, creating the Quebec Harbour Commissioners had vested in that body the jurisdiction theretofore vested in the Trinity-House, and that the beaches in the Harbour of Quebec were the property of the Commissioners, and, consequently, under their control. It was also pretended that the judgment against Lane was excessive, inasmuch as the by-law limited the fine to £10, and the judgment was for £10 and costs. On the part of Plaintiff it was said that, although by the 22 Vict. cap. 32, the beaches on the north side of the Harbour of Quebec had been vested in the Quebec Harbour Commissioners, it was not, from that, to be inferred that the jurisdiction heretofore exercised by the Trinity-House had been taken from that body ; that the Harbour Commissioners were a body appointed for a special purpose, and that to carry out the object for which they are created, certain property, before the passing of the act, belonging to the Crown, was vested in them, but that so far as the Trinity-House was concerned, they, the Harbour Commissioners, must be looked upon as a private individual subject to the rules and by-laws laid down by the Trinity-House, which was a body exercising more general and more public powers than the Quebec Harbour Commissioners, and that, in fact, the Harbour Commissioners were no better than individual proprietors or occupants, and subject to the Trinity-House for the infringement of the by-laws of that board concerning the beaches generally. The attention of the court was also drawn to the 27th section of the 22 Vict., cap. 32, which section preserves intact the rights of all bodies which existed at the time of the passing of the said act.

STUART, Justice : In execution of the very general powers of making by-laws, "for the improvement and management of the Harbour of Quebec," conferred upon the Trinity-House of Quebec, by the 12 Vict., cap. 114, the Trinity-House passed the 41st by-law, which is in the following terms : "That any person or persons who shall obstruct any of the "landing places within the Harbour of Quebec, or who shall "incumber any part of the space between high and low water

" marks of the several beaches within the said harbour, with " timber, masts, logs or rafts, so as to prevent a free, conti- " nuous and uninterrupted passage and communication from " the several streets and lanes of the city of Quebec, leading " towards the rivers St. Lawrence and St. Charles, over the " beaches of the same, down to low water mark, to the full " breadth of every such street or lane, respectively, shall incur " and pay a penalty not exceeding ten pounds currency." It is for a breach of this by-law that Lane was brought before the Trinity-House and fined £10. The conviction is manifestly right if the Trinity-House continues to have jurisdiction over the subject matter. By the 22 Vict., cap. 32, intituled : " An act to provide for the improvement and management of the Harbour of Quebec," a corporation by the name of " Quebec Harbour Commissioners " is created, with power to make by-laws, and to impose penalties under the same, not exceeding twenty dollars, or sixty days imprisonment, against all persons who may infringe the same, among other purposes for the prevention of injury to the property of the Corporation, *and encroachment and incumbrances thereon, and the removal of the same.* Now, the 2nd sec. of this act vests in this corporation : " All land below the line of high water on the north side of the River St. Lawrence," within limits including those in question in this cause, then belonging to Her Majesty. Lane produces a lease from the Commissioner of Crown Lands, as the title by which he occupies the space complained of, leaving no doubt of the fact of the property in question being now vested in the Harbour Commissioners. The question as limited by the case under consideration is whether the Statute 12 Vict., cap. 114, is repealed by the 22 Vict., cap. 32, in so far as the beaches on the north side of the St. Lawrence are concerned. The power of the Trinity-House to pass the by-law for the violation of which Lane has been convicted has not been called in question, and the power of preventing the beaches from being encumbered would appear to be incident to the very general powers of the Trinity-House to make by-laws " for the improvement and management of " the Harbour of Quebec." Whether the improvement and management of the Harbour of Quebec can be vested in two separate corporations at the same time, or whether the passing of the last act for that purpose is a repeal of the first, *leges posteriores priores contrarias abrogant*, is not the large question to be decided in this case, but the much more limited question whether the beaches are not now vested in the Quebec Harbour Commissioners, in whom alone reside the power of punishing any person who may encroach upon or encumber them. The power of the Trinity-House over the

beaches on the north side of the St. Lawrence was merely of management, they continued to be vested in the crown, whereas now, all land below the line of high water on the north side of the River St. Lawrence is vested in the Quebec Harbour Commissioners. Incident to the right of property they must be held to have the control and management, but the act itself puts this beyond doubt by providing that the Quebec Harbour Commissioners may make by-laws for: "The "prevention of injury to the property of the Corporation, and "encroachment and encumbrances thereon, and the removal "of the same." It is therefore the opinion of the court that in so far as the beaches of the north side of the river St. Lawrence are concerned, the same are now vested in the Quebec Harbour Commissioners, and that they alone have the management and control of the same, and that the Trinity-House act in so far as it conferred any powers of control and management over those beaches, is repealed by implication. It is desirable that it should be distinctly understood that this decision does not go beyond the question raised in this cause. (11 *D. T. B. C.*, p. 453.)

DUGGAN and DUGGAN, for Petitioner.

ALLEYN, R., for Respondent.

GARDIEN.—RESPONSABILITE.—PROCEDURE.

SUPERIOR COURT, Quebec, 1st October, 1861.

Before STUART, Justice.

BERRY *vs.* COWAN et al.

Le Défendeur, Cowan, devint le gardien d'effets saisis à l'instance de Berry, en vertu d'un writ de saisie-arrêt simple dans une cause dans dans laquelle il était Demandeur, et le nommé May, Défendeur; subséquemment les mêmes effets furent saisis et vendus en vertu d'un writ de *fieri facias* émané à la poursuite d'un nommé Tremain; sur ce, le Demandeur institua son action contre le Défendeur, concluant à ce que le Défendeur fut condamné à représenter les effets, ou à en payer la valeur. A cette action le Défendeur plaida par défense au fond en droit et sur cette défense il fut:

Jugé: Que, si dans les circonstances de la cause, le Demandeur avait aucun droit à exercer contre le Défendeur, ce ne pouvait être par action directe contre le Défendeur, mais bien au moyen d'une règle pour contrainte dans la cause où il avait été constitué gardien, pour le contraindre à produire les effets ou à en payer la valeur. (1)

Berry alleged by his declaration, that, on the 27th October, 1859, at his intance, the sheriff of this district seized and attached, by *saisie-arrêt simple* before judgment, all the goods

(1) N. art. 577 et 597 C. P. C.

and chattels belonging to Henry May, his debtor; that a *procès-verbal* having been made, Cowan became the voluntary guardian or *dépositaire* of the goods so seized, and signed the *procès-verbal*, and, thereby, became bound in law to take charge of and safely to keep the goods until they should be required of him by the sheriff, or until he should be otherwise legally discharged from his custody; that, on the 13th of February, 1860, judgment was rendered in the cause of *Berry* vs *May*, and the attachment made under the writ of *saisie-arrêt simple* declared valid; that, afterwards, on the 27th February, 1860, under color of a writ of execution issued from the Circuit Court, in a case of *Tremain vs. May*, the goods were again seized; and that Cowan, not regarding his duty as guardian, *dépositaire*, suffered them to be so illegally seized, and, on the 7th of March, 1860, to be sold and carried away by the *adjudicataire*; that, by reason of the premises, the second seizure and all the subsequent proceedings thereon were and should be held to be illegal and Cowan compelled, by *contrainte par corps*, either to bring back the goods and deliver them into the hands of the sheriff, or in default of his so doing, to pay and satisfy to Berry the sum of $3000.00, the value of the goods, with interest and costs. Cowan answered, by a *défense au fond en droit*, founded upon the following reasons: 1° Because it appears, by Plaintiff's declaration, that the attachment under which the goods were seized by him, was a mere *saisie conservatoire* under a writ of *arrêt simple* before judgment; 2° Because the writ under which Tremain took the goods and chattels into execution, and under which writ they were sold, was a *saisie exécution*, and that by reason thereof, the *saisie exécution* had by law *la préférence*; 3° Because, by law, Cowan could not, as guardian to a mere *saisie conservatoire*, oppose the proceedings of Tremain, carried on under the sanction of a writ of *saisie exécution*, which by law superseded the *saisie conservatoire*; 4° Because the fact of a *saisie conservatoire* having, by the judgment of the Court in the cause in which such *saisie* had been effected, been declared good, does not in law give such *saisie conservatoire* a preference over a *saisie exécution*; 5° Because, by the law of the land, no judicial sale can take place under a writ of *saisie-exécution*, unless and until certain formalities and notices as prescribed by law take place, of which all Her Majesty's subjects are bound to take cognizance; 6° Because it is not alleged that the said formalities and notices were not given or had; 7° Because it was not the duty of Cowan, as guardian, nor was he bound in law, nor could he prevent the sale by Tremain of the goods; 8° Because it does not appear in Plaintiff's declaration, that the seizure of the goods made by

Tremain was illegal; 9° Because the guardian or *dépositaire* of goods seized under a writ of any description whatever, cannot be proceeded against by direct action, as in the present case, the remedy of Plaintiff, if any he hath, against Cowan, being by a motion for an attachment to compel him to produce the effects, or to pay their value; 10° Because it does not appear in Plaintiff's declaration that, up to the period of the sale made of the goods at the instance of Tremain, he was ignorant of the seizure, or that he was prevented from filing his opposition to the seizure or sale; 11° Because if Cowan, as guardian, was under any legal obligation towards Plaintiff in respect of any legal process by any other party against the goods in his charge, such obligation could only be to notify plaintiff of such legal process, and because it no where appears in the declaration that he failed to give due notice thereof to Plaintiff.

For Plaintiff it was contended that the question involved in the case had been decided by the Court of appeal, in a case of *Ouimet* vs. *Senécal*, in which case it was held: "That a di-" rect action will lie to have a sale of moveables set aside for " fraud; and this though a judicial sale has been resorted to." (8 *R. J. R. Q.*, p. 139 et 142.)

JUDGMENT: The Court, considering the *défense au fond en droit* of John Cowan, one of defendants to be well founded in law, doth maintain the same, and, thereupon, doth dismiss the present action as regard John Cowan. (11 *D. T. B. C.*, p. 476.)

HOLT and IRVINE, for Plaintiff.

LELIÈVRE, for Defendant.

CAPIAS.

SUPERIOR COURT, Quebec, 5 novembre 1861.

Before STUART, Justice.

HAMEL *et al. vs.* COTÉ *et al.*

Jugé: 1° Que lorsqu'un individu a été arrêté en vertu d'un writ de *capias ad respondendum*, et que l'arrestation a été déclarée illégale, il doit être complètement et pleinement remis en liberté avant de pouvoir être arrêté en vertu d'un second *capias*.

2° Que la signification d'un writ à un individu, ou son arrestation entre deux guichets, est une signification ou une arrestation, selon le cas, d'une personne encore sous la garde du geolier.

Il semble que si le Défendeur eût été arrêté par une autre personne dans une autre cause, que telle arrestation eût été valide.

The action was commenced in September last, by the issuing of a *capias ad respondendum*, at the instance of Plaintiffs against Côté, one of Defendants, who was thereupon arrested

and brought before the court to answer Plaintiffs' action. It was moved, on behalf of Defendant, that the *capias* be set aside and Defendant released, by reason of certain informalities in the affidavit upon which the *capias* had issued; judgment was rendered on the motion on the 4th of October last, granting the conclusions thereof, and ordering Côté's release. The Plaintiffs thereupon, and on the same day, produced another affidavit and obtained the issuing of a second *capias*, under which Côté, who had not yet been discharged from the custody of the gaoler, was again arrested and detained in prison. It was again moved that the second *capias* be quashed, and that Côté be released from imprisonment, for the following reasons: 1° Because one writ of *capias ad respondendum* had already issued against him in this cause, in virtue of which he had been imprisoned and because he had not been released from this imprisonment at the time of his arrest under the second *capias*; 2° because, by the judgment rendered on the 4th of October last, the first *capias* was quashed, and it was ordered that Côté, should be restored to liberty; 3° because two writs of *capias ad respondendum* cannot issue in one and the same cause, and for the same reasons; 4° because the affidavit in support of the second *capias* was insufficient, and did not contain special and sufficient reasons to entitle Plaintiffs to believe that he, Côté, had secreted his estate, debts and effects with intent to defraud them, &c. In support of this motion it was contended, that Côté could not be arrested under a second *capias*, while still detained under a prior writ; (1) that two writs of *capias* could not issue in the same cause, and for the same grounds of action. (2)

STUART, Justice: The present application to quash a writ of *capias ad respondendum*, the second issued in the present cause, is made on three grounds. 1st That Côté was not liberated from arrest under the first writ before he was again arrested under the present. 2nd That two writs of this nature cannot issue in the same case. 3rd That the affidavit is insufficient. English and French authorities agree that, where an arrest is declared illegal, a detainer of the party, called in the french law *recommandation*, is not effective, and numerous authorities under both systems of law have been referred to in argument. This principle is probably only applicable where the arrest is illegal from some fault in the arresting officer, as

(1) 2 *Dictionnaire de droit*, vbo *Recommander un prisonnier*; 7 Nouveau Dénizart, vbo *Elargissement*, p. 443; *Décision du palais*, vbo *Contrainte par corps*, pp. 254 and 255.

(2) Tidd's *Practice*, p. 174 (9th ed.): 2 Peterdorff's *Abrigdt*, vbo *Arrest*, (2 arrest.), pp. 307, 311, 312 and 317; 2 East's *Reports*, p. 243; 24 *English law and equity reports*, pp. 148 and 149, *ex parte* Egginton.

if the arrest be made on a sunday or in a place where the law protects the party from arrest, but, it is thought, would not apply to a case like the present, where the sheriff legally arrested Defendant, and where the party is enlarged from custody for informalities anterior to the issuing of the writ. But whatever might be the view taken by the Court of the validity of a detainer by a third person in a case like the present it is clear that Plaintiffs cannot be allowed to take advantage of what must be considered their own wrong, and engraft upon it a proceeding which will give it the effect of a detainer, Defendant must be set fully at liberty as ordered by the Court, and as that was not done in the present case, the first ground must be considered good. There is no case in the Courts of Lower Canada that could be produced in which a second *capias* has issued after the first had been quashed, nor has any authority been cited to justify such a step ; in the absence of authority and of practice upon a point of this kind, the second ground must also be held good. As to the third ground, although the party making the affidavit swears to the insolvency of Defendant, and to his having carried on business after such insolvency, that is no ground for his arrest, unless he has refused to make a *cession de ses biens* to his creditors, this refusal is not sworn to, the *capias* must be quashed.

JUGEMENT : " La Cour, vu la motion faite en cette cause le deux du courant, de la part du dit Majorique Côté pour que le second bref de *capias ad respondendum*, émané en cette cause le quatre octobre dernier, soit annulé, et, en conséquence, Côté mis en liberté, pour les raisons mentionnées en icelle motion accorde la motion, et ordonne que Côté soit mis en liberté. (11 *D. T. B. C.*, p. 479.)

CASAULT et LANGLOIS, pour les Demandeurs.

LÉGARÉ et MALOUIN, pour le Défendeur.

SECURITY FOR COSTS.

SUPERIOR COURT, Montreal, 19th June, 1861.

Coram BERTHELOT, J.

POWERS *vs.* WHITNEY.

Held : That the offer of the obligation of one person as security for costs is insufficient. (1)

The Plaintiff, having been ordered to give security for costs as residing without the limits of Lower Canada, made a motion

(1) V. art. 29, C. C.

before the court to be permitted to give the personal undertaking of one Stephens Jones Lyman as such security.

TORRANCE, for Defendant, resisted the motion, on the ground that the personal undertaking of one surety was insufficient by law, and cited the case of *Donald* vs. *Becket*. (8 *R. J. R. Q.*, p. 130, Monk, Judice.) The court maintained the objection. Motion rejected. (6 *J.*, p. 40)

A. and W. ROBERTSON, for Plaintiff.

TORRANCE and MORRIS, for Defendant.

SECURITY FOR COSTS BY PLAINTIFF TO OPPOSANTS.

SUPERIOR COURT, Montreal, 30th April, 1861.

Coram Smith, J.

MERRILL *vs.* MCDONALD et al., and ROSS et al., Opposants.

Held: That a non-resident Plaintiff, who has contested the opposition of an opposant, is not bound to give this opposant security for the costs of his contestation. (1)

The Plaintiff, whose domicile was in New York, United States, contested the opposition of Opposants Ross and others, by a contestation fyled on the 26th February, 1861. On the 18th March following, Opposants Ross and others moved the court that Plaintiff be ordered to give security for the costs of his contestation, inasmuch as he had no domicile in Lower Canada, but resided in New-York. The court decided that Plaintiff was not bound to give such security to an Opposant. Motion dismissed. (6 *J.*, p. 40.)

A. and W. ROBERTSON, for Plaintiff.

C. J. DUNLOP, for Opposants.

EXPERTISE.—PROCEDURE.

Montréal, 30 septembre 1861.

Coram SMITH, J.

JOSEPH *vs.* OSTELL.

Jugé: Que la déclaration faite par des arbitres dans leur rapport, qu'ils ont été assermentés, ne suffit pas pour prouver qu'ils ont rée lement été assermentés, et que leur rapport sera rejeté, s'il ne produisent, au soutien de leur rapport, le certificat des personnes devant qui tel serment a été prêté. (2)

(1) V. art. 29. C. C.

(2) V. art. 330 et 331, C. P. C.

La contestation en cette cause ayant été, du consentement des parties, référée à des arbitres, avec instruction de se faire assermenter avant d'opérer, les arbitres procédèrent et firent un rapport défavorable au Demandeur. Dans leur rapport, les arbitres déclarent qu'ils ont été assermentés conformément à l'ordre de la cour, mais ne produisirent aucun certificat à cet effet. Le Défendeur, ayant fait motion pour homologuer le rapport des arbitres le Demandeur s'y opposa, et fit de son côté une motion pour le rejeter, attendu qu'un des arbitres n'avait pas prêté le serment requis par le jugement interlocutoire, avant d'opérer, et prétendit que c'était aux arbitres à prouver qu'ils avaient été régulièrement assermentés devant une personne compétente, et que la déclaration contenue dans leur rapport ne suffisait pas pour satisfaire la cour, lorsqu'elle était mise en question par l'une des parties. Le Défendeur prétendait qu'en l'absence de preuve contraire, la déclaration des arbitres suffisait. La cour adopta les prétentions du Demandeur, et ordonna que le rapport fût renvoyé aux arbitres, afin de leur donner l'occasion de produire la preuve qu'ils s'étaient conformés aux exigences du jugement qui leur référait la cause. Les arbitres n'ayant pu produire la preuve qu'ils avaient tous été assermentés, leur rapport fut rejeté, avec dépens, sur motion du Demandeur, faite le 19 octobre, 1861, devant l'honorable Juge Berthelot. (6 *J.*, p. 40, et 11 *D. T. B. C.*, p. 499.)

CHERRIER, DORION et DORION, avocats du Demandeur.

MACKAY et AUSTIN, avocats du Défendeur.

ARTICULATIONS DE FAITS.

COUR DU BANC DE LA REINE, EN APPEL,

Montréal, 1 juin 1861.

Coram Sir L. H. LAFONTAINE, Bart, J. C., AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET J.

BÉLANGER, Défendeur et Opposant en Cour Inférieure, Appelant, *et* MOGÉ, Demandeur en Cour Inférieure, Intimé.

Jugé : Que le défaut de production d'une articulation de faits par l'une ou l'autre des parties, n'a pas l'effet d'empêcher la cause d'être instruite et jugée. (1)

Par sa requête en appel, l'Appelant se plaignait de ce que son opposition produite devant la Cour Inférieure, " n'était pas, " lors du jugement, en état d'être jugée, vu que l'articula- " tion de faits prescrite par la loi n'avait et n'a jamais " été produite de la part d'aucune des parties en la

(1) V. art. 207 et 215 C. P. C.

" cause." Devant la Cour Inférieure, dans le cours de l'instruction de cette opposition, le Demandeur ayant produit une articulation *générale*, et le Défendeur Opposant n'en ayant produit aucune, ce dernier fit motion que " l'inscription " faite dans la cause (l'opposition), pour la preuve en icelle " et l'audition au *mérite* en même temps, fut *déchargée*, en " autant qu'aucune *articulation de faits*, n'avait été pro- " duite par aucune des parties; que la prétendue *arti-* " *culation de faits* filée de la part du Demandeur, n'en " était pas une, vu qu'elle *n'articulait* aucun fait d'une " *manière spéciale*, qu'elle n'était en aucune manière con- " forme ni à l'esprit ni à la lettre du statut, et que, partant, " elle devait être considérée comme non-avenue." La Cour Inférieure, par son jugement final, rendu le 17 février 1860, tant sur cette motion que sur le mérite de l'opposition, rejeta la première partie de la motion qui tendait à faire radier l'inscription, et accorda la dernière partie d'icelle, et, en conséquence mit de côté l'articulation de faits, et débouta l'Appelant de son opposition, avec dépens, pour les motifs qui sont énoncés dans le jugement comme suit: " considérant que l'Opposant (Défendeur dans la cause) n'avait que la voie d'appel, ou tout au plus celle de requête civile pour faire reviser et annuler, si le cas y échéait, le jugement prononcé en cette cause le sept février dernier, et non la voie de l'opposition à fin d'annuler, a débouté et déboute l'opposition à fin d'annuler produite en cette cause par le Défendeur et Opposant, le treize juillet dernier, avec dépens."

Lafrenaye pour l'Intimé: Il n'existe dans la loi aucune disposition pour obliger aucune des parties à filer une articulation de faits; il s'ensuit, d'après les prétentions de l'Appelant qui soutient que son opposition n'était pas en etat d'être jugée, vu le défaut ou le manque d'articulation de faits, que le créancier Demandeur serait toujours à la merci d'un débiteur de mauvaise foi qui s'abstiendrait de produire une articulation de faits. *Vide*, statuts refondus du Bas-Canada, ch. 83, sect. 89 et 90. La seule pénalité qu'encourt la partie qui néglige de produire son articulation de faits, dans le cas où elle désire ensuite faire une enquête, est celle imposée à tout plaideur téméraire, le paiement des frais. La cause d'Archambault et Archambault a déjà été décidée par cette cour sans aucune articulation de faits de la part de l'une des parties. (8 *R. J. R. Q.*, p. 441.) Jugement confirmé (6 *J.*, p. 61.)

E. U. PICHÉ, avocat de l'Appelant.

LAFRENAYE et BRUNEAU, avocats de l'Intimé.

COURT OF QUEEN'S BENCH, IN APPEAL,
Montreal, 5th September, 1861.

Coram Sir L. H. LAFONTAINE, Bart., C.-J. AYLWIN, J., DUVAL, J., MEREDITH, J., MONDELET, J.

ANTOINE MERIZZI, (Plaintiff in the court below,) Appelant, and PETER COWAN, (Defendant in the court below,) Respondent.

Held: 1st That money tendered and paid into court with Defendant's plea, and not accepted by Plaintiff, cannot be recovered from the clerk of said court by direct action against him, as for money had and received.
2nd That the proper mode of proceeding, in such case, is by rule upon the clerk, ordering him to pay over said money. (1)

Action of Rice against Merizzi, in the Circuit Court, for a sum exceeding £28. Defendant tendered with his plea, and consigned into the hands of Peter Cowan then clerk of said Circuit Court, £28. Rice refused to accept tender, proceeded with his action, and recovered judgment for a larger sum than the amount tendered. In the meantime, Cowan ceased to be clerk of said Circuit Court, which was abolished by act 20 Vict., cap. 44, and Mr. Hall, thereupon, became clerk of the new Circuit Court for the district of Bedford. Rice's judgment remaining unsatisfied, he issued execution against Merizzi for the full amount, without reference to the £28 deposited. Merizzi paid into the hands of Mr. Hall a sum sufficient, together with the £28, which he assumes was available to pay up the judgment, and Mr. Hall never having received the £28 from Cowan, was called upon by Rice for an execution which was issued, and Merizzi obliged to pay the £28 over again. Upon this, Merizzi instituted an action against Cowan, for the £28 and damages, alleging that execution had issued by the default and negligence of Cowan in not paying over the £28 to Hall, his successor in office; to which action, Cowan pleaded that he was not liable by direct action, and that he was only amenable to a rule of the court, and that he would not even return the £28 to Merizzi except in obedience to an order of the court, ordering and authorizing him so to do, that he was merely the officer of the court, and had no authority to pay over to any one, of his own motion, a sum of money tendered into court, and constituting for the time being, part of the record in which it had been paid. The Superior Court (J. S. McCORD, J.) dismissed Plaintiff's action; hence the present appeal.

(1) V. art 543 C. P. C.

MEREDITH, J.: It seems more than probable that all the equities of the case are in favour of Plaintiff, but, still, I cannot say that the judgment of the Court below, which is in favour of Defendant, is in law, wrong. When a sum of money is deposited in the course of a suit, in the hands of a clerk of a court, he, it appears to me, holds such sum of money subject exclusively to the orders of the court of which he is an officer. For instance, if, in the progress of an appeal before us, a sum of money were deposited in the hands of the clerk of this court, it would appear to me contrary alike to law and justice, that that officer shonld be summoned, either before the Superior Court, or the Circuit Court, to hear in what manner he should pay over the sum of money so deposited in his hands. It is very probable that, in the present case, Defendant might, without any risk, have paid over the money in his hands, without an order of the court in which it was deposited; but, as a general rule, it would not be safe for the clerk of a court to adopt that course, and I do not see that he ought, in any case, to be compelled to do so. If a prothonotary or clerk of a court, pay over the money in his hands in obedience to an order of court, he is free from responsibility, whether the order be legal or illegal; but if he make the payment, without such an order, he would of course do so on his own responsibility; and I do not think he ought to be compelled to assume such responsibility; because, according to my view, money deposited in the hands of a prothonotary, or other such officer, must be considered as having been received subject to the implied condition, that, in paying it away, he should not be subject to any responsibility beyond that of obeying the order of the court of which he is an officer. The judgment of the court below is in accordance with this view, and I therefore think it ought to be confirmed.

MONDELET, J.: L'Appelant avait poursuivi l'Intimé dans la Cour Supérieure du district de Bedford, pour le recouvrement de £28 qu'il avait déposés entre les mains de l'Intimé alors greffier de la cour, comme *consignation* accompagnée de son plaidoyer contenant offres, etc., dans une cause à la poursuite de Charles D. A. Rice, contre lui, l'Appelant, et ce, le 26 mai 1857. Rice ayant refusé ces offres, obtint jugement contre l'Appelant à la Cour de Circuit du district de Bedford, pour un montant excédant ces £28. Le 25 octobre suivant, l'Appelant paya le montant du jugement, moins les £28 dont il avait fait le dépôt comme sus-mentionné. L'Intimé n'ayant pas payé, ni à Rice ni à Hall, qui lui a succédé comme greffier, Rice fit émaner une exécution contre l'Appelant qui eut à payer ces £28, et en sus de ces £28 qu'il réclame de l'Intimé, il réclame £25 de dommages. La prétention de l'Intimé, tout

en admettant le dépot, est que, durant l'instance dans la poursuite de Rice contre l'Intimé, la Cour de Circuit pour Missisquoi, cessa d'exister, et qu'en cessant d'être greffier de cette cour, il devenait responsable envers son successeur à qui il devait transmettre les records, argents, etc. Que l'on avait, à tort lancé un bref d'exécution contre l'Appelant, en faveur et au profit duquel, l'on aurait dû déduire sur le montant du jugement de Rice les £28 que Merizzi avait consignés. La preuve établit tous les faits à l'exception des dommages. Il est évident que l'Intimé est en défaut, et est la cause première de ce qui est résulté à l'Appelant, de l'émanation de l'exécution pour le montant entier du jugement à la poursuite de Rice. Cependant, est-il bien certain que l'Appelant a par l'action *telle qu'intentée* contre l'intimé, le recours qu'il prétend exercer ? L'Intimé n'est plus le greffier de la cour, son obligation était et est encore de remettre à Hall qui a été nommé greffier de la *nouvelle* cour, après l'abolition de la *précédente*, le montant de la consignation, et ne serait-ce pas plutôt le greffier de la présente cour qui aurait dû se faire remettre ce dépot, à qui on eût dû s'en prendre ? Si la réponse à cette objection, était sa solution dans la négative, ne pourrait-on pas dire que l'action aurait dû être contre l'Intimé pour n'avoir pas payé les £28 à Hall, lui donnant l'alternative, ou de faire bon de cette somme soit à Hall soit à Rice, ou à produire une décharge de ce dernier ? Ceci n'est pas sans difficulté et mérite qu'on en discute. Having since conferred with the Chief Justice, it might be said that Cowan having the money which he has neither passed to Hall nor paid to Plaintiff, he should be held for it. Upon again going over this case. I come to the conclusion that Cowan should have been called upon, by a rule of court, to account for the money and deposit it in the hands of the present prothonotary, to whom by law he was and is bound to deliver up all records and moneys he has in his possession, as having been clerk or prothonotary of the court. But I deny to Merizzi a direct action of his own accord against Cowan.

The Chief Justice LAFONTAINE and Mr. Justice AYLWIN, dissenting from the judgment, stated, in effect, that they were of opinion to reverse the judgment, in accordance with the judgment rendered by the Court of Appeals in *Irwin* vs. *Boston* (4 *R. J. R. Q.*, p 390), from which they considered the present judgment to be a departure. Judgment confirmed. (6 *J* p. 62.)

LAFLAMME, LAFLAMME and DALY, for Appellant.

M. DOHERTY, for Respondent.

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